# STATE PRACTICE

# State Practice of Asian States in the Field of International Law

## EDITORIAL NOTE

The Editorial Board has decided to reorganize the format of this section from Volume 16 (2010) onwards. Since the Yearbook's inception, state practice has always been reported and written up as country reports. While this format has served us well in the intervening years, we felt that it would make a lot more sense if we reported state practice *thematically*, rather than geographically. This way, readers will have an opportunity to zoom in on a particular topic of interest and get a quick overview of developments within the region. Of course, this reorganization cannot address our lack of coverage in some Asian states. We aim to improve on this in forthcoming volumes and thank the contributors to this section for their tireless and conscientious work.

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# Air Law

## PHILIPPINES

### CONVENTION OF INTERNATIONAL CIVIL AVIATION – TAX EXEMPTIONS

***Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation* [G.R. No. 188497. 25 April 2012]**

Pilipinas Shell Petroleum Corporation is engaged in the business of processing, treating and refining petroleum for the purpose of producing marketable products and the subsequent sale thereof. It filed with the Bureau of Internal Revenue a formal claim for refund or tax credit in the total amount of P28,064,925.15, representing excise taxes it allegedly paid on sales and deliveries of gas and fuel oils to various international carriers during the period October to December 2001. Subsequently, a similar claim for refund or tax credit was filed covering the period January to March 2002 in the amount of P41,614,827.99. Again, another formal claim for refund or tax credit in the amount of P30,652,890.55 covering deliveries from April to June 2002 was filed.

No decision on the claims was taken, so Pilipinas Shell filed petitions for review before the courts. The Supreme Court states that the Solicitor General argues that the obvious intent of the law is to grant excise tax exemption to international carriers and exempt entities as buyers of petroleum products and not to the manufacturers or producers of said goods. Excise tax on petroleum products attached to the said goods before their sale or delivery to international carriers, as in fact Pilipinas Shell averred that it paid the excise tax on its petroleum products when it "withdrew petroleum products from its place of production for eventual sale and delivery to various international carriers as well as to other customers."

Among others, the Court held that in the case of international air carriers, the tax exemption granted under the Tax Code is based on "a long-standing international consensus that fuel used for international air services should be tax-exempt." Furthermore, the provisions of the 1944 Convention of International Civil Aviation or the Chicago Convention, which form binding international law, requires the contracting parties not to charge duty on aviation fuel already on board any aircraft that has

arrived in their territory from another contracting state. The exemption of airlines from national taxes and customs duties on a range of aviation-related goods, including parts, stores and fuel is a standard element of the network of bilateral "Air Service Agreements." A resolution of the International Civil Aviation Organization expanded the provision as to similarly exempt from taxes all kinds of fuel taken on board for consumption by an aircraft from a contracting state in the territory of another contracting State departing for the territory of any other State. The tax exemption now generally applies to fuel used in international travel by both domestic and foreign carriers. However, on reasons relating to a strict construction of domestic law when it comes to tax exemptions, the Court denied Pilipinas Shell's claims for tax refund or credit.

## Aliens

### CHINA

#### VISA – EUROPEAN UNION – MUNICIPAL LAW

**72-hour Visa-Free Travel to Beijing and Shanghai for Foreign Nationals from 45 Countries**

The State Council approved the application from the Beijing municipal government on April 28, 2012, allowing foreigners of 45 countries to stay in Beijing without a Chinese visa for 72 hours. This measure entered into force on 1 January 2013. It also applies to Shanghai. Those 45 countries are: 31 European Union countries (Austria, Belgium, Bulgaria, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine and the United Kingdom), 6 American countries (Argentina, Brazil, Canada, Chile, Mexico and the United States) and 8 Asian and Oceanian countries (Australia, Brunei, Japan, Qatar, New Zealand, Singapore, South Korea and the United Arab Emirates).[1]

1 外国人72小时过境免签常遇问题解答, Generalkonsulat der Volksrepublik China in Hamburg, http://www.fmprc.gov.cn/ce/cgham/chn/lsyw/t1067995.htm.

**EXIT AND ENTRY – ADMINISTRATIVE ACT – VISA – WORK PERMIT – PUBLIC SECURITY**

## Act on Administration of Exit and Entry Adopted

On June 30, 2012, the 27th Session of the Standing Committee of the 11th NPC adopted the Act on Administration of Exit and Entry. This Act defines "exit" as the leave from inland China to other countries or regions, from inland China to Hong Kong Special Administrative Region, Macau Special Administrative Region, or from mainland China to Taiwan region. "Entry" is defined as entry from other countries or regions to inland China, from Hong Kong Special Administrative Region or Macau Special Administrative Region to inland China, or from Taiwan region to mainland China. "Alien" is defined as any person without Chinese nationality (article 89).

This Act is applicable to the exit and entry of Chinese citizens, the entry and exit of aliens, the residence of aliens in China and border examination of exit and entry of transport vehicles. This Act provides that subject to approval by the State Council, the Ministry of Public Security and the Ministry of Foreign Affairs may, depending on the needs of the administration of exit and entry, make rules on human bodily biological identification information including fingerprints reserved at exit and entry. If foreign governments have special provisions on the administration of issuing visas to, and exit and entry of, Chinese citizens, the Chinese government may, depending on the circumstances, take corresponding reciprocal measures (article 7).

No visa will be issued to an alien if one of the following circumstances applies: he or she (1) has been deported or repatriated, and the time of forbidding entry has not expired; (2) has a serious mental disorder, infectious tuberculosis or any other infectious disease which may cause serious danger to public health; (3) may endanger China's national security and interest, damage social public order or commit any violation of law and crimes; (4) deceitfully applies for visa or is unable to afford the stay in China; (5) is unable to provide the relevant documents required by the visa organs; (6) any other circumstance for which the visa organs consider it not proper to issue visa. No reason would be given for the refusal to issue a visa (article 21).

No alien is allowed to enter China if one of the following circumstances is found: (1) he or she does not hold a valid exit and entry certificate, or

refuses to accept or escape from border examination; (2) one of the circumstances in article 21 (1)–(4) of this Act is found; (3) he or she may commit any activity inconsistent with the type of visa; (4) any other circumstance for which laws or regulations forbid the entry. No reason would be given by the border examination organs to those who are refused to enter (article 25).

No alien is allowed to exit if one of the following circumstances applies: (1) he or she has been convicted and sentenced but the sentence has not yet been carried out; or he or she is a criminal defendant or suspect, except in the case of transfer of the convicted persons in accordance with the relevant agreement concluded between China and foreign States; (2) he or she is not approved for exit by the people's court due to involvement in an on-going civil case; (3) he or she is not approved for exit by the relevant organs of the State Council or provincial governments for not paying remuneration to labourers; (4) other circumstances under which laws or administrative regulations forbid the exit (article 28).

No alien who stays or resides in China shall commit any activity inconsistent with the reason for his or her stay and residence; every alien shall exit before the time of stay or residence expires (article 37).

Any alien who works in China shall obtain work permit and residence certificate for work in accordance with relevant regulations. No unit or individual shall employ an alien without work permit or residence certificate for work (article 41).

Illegal work is present if an alien commits any of the following activities: (1) works in China without work permit or residence certificate for work; (2) works in China beyond the scope of work permit; (3) foreign students work in China in violation of regulations on teaching assistance, beyond the scope of the position or limitation of hours (article 43).

If an alien is applying for refugee status, he or she may stay in China by virtue of the temporary identity certificate issued by the public security organs during the period of identification. If refugee status is granted, he or she may stay and reside in China by virtue of the refugee identity certificate issued by the public security organs (article 46).[2]

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2 *Exit and Entry Administration Law of the People's Republic of China*, Bureau of Exit and Entry Administration of the Ministry of Public Security, http://www.mps.gov.cn/n16/n84147/n84181 /3837123.html.

# KOREA

## CONSCIENTIOUS OBJECTOR – FREEDOM OF CONSCIENCE – RELIGIOUS BELIEF – DUTY OF MILITARY SERVICE - INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ARTICLE 18

**[2010No425, 2011No115 (Joinder), 2011No903 (Joinder) April 18, 2012]**

*Facts*

The Defendants who are Jehovah's Witnesses refused to participate in homeland reserve forces training as conscientious objectors.

*Legal Issues*

Whether conscientious objection is protected under the Constitution of the Republic of Korea Article 6, Section 1 that incorporates International treaties, especially the International Covenant on Civil and Political Rights Article 18.

*Judgment*

The Court ruled that the Establishment of Homeland Reserve Forces Act did not violate the freedom of conscience as following:

> The Act at issue in this case has a justified legislative intent to maintain homeland reserve forces by enforcing reserve forces training to fulfill military duty in a fair manner of sharing the burden of military service. Ultimately, the Act fulfills national security assurance that is legally protected right under the Constitution. In addition, the Act is an appropriate mean to fulfill the legislative intent because the Act forces the duty of reserve forces training by imposing penalty to those who fail to participate in the training. . . . Thus, the conscience objectors should be punished under the Act. Nonetheless, the public interests the Act pursues are the fundamental interest of national security and bearing fair burden of duty of military service that are the preconditions for existence of nation and all freedoms. Thus, conscience objection, by refusing to fulfill the duty of the reserve force training, is asking for exception to the duty of training that every person bears. Consequently, for the fairness in bearing burden to fulfill the duty of military service, making exception will have a great ripple effect on other people and the society as a whole. Therefore, the Act at issue cannot be

> regarded as having lost the balance of legally protected right when the defendants are punished in violation of this Act.

The court also ruled about whether conscience objection is generally approved international regulation and whether the International Covenant on Civil and Political Rights is relevant to the Act at issue as following:

> It is difficult to conclude that our country's accession to the International Covenant on Civil and Political Rights in April 10, 1990 would automatically recognize the right of conscience objection or bring the legally binding effect on recognizing conscience objection in military service. In addition, there is no expressed International human rights treaty that deals with conscience objection. Although there are some countries including European countries that acknowledge the conscience objection, it does not lead us to conclude that there is an international customary law that generally recognizes one. Accordingly, in our country, conscience objection cannot be accepted as an International regulation. Therefore, punishment of conscience objectors in the reserve force training under the Act at issue does not violate the Constitution Article 6 Section 1 that declares the principle of respect for international law. (See the decision of the Constitutional Court on 2007 HUNBA 12, 2009 HUNBA 103 (Joinder) in August 30, 2011.)

In conclusion, the court ruled that refusing to participate in the reserve force training, even if such objection is based on the freedom of conscience and the religious beliefs, is not a lawful reasoning. Thus, the court ruled that the defendants' arguments have no merit.

### IMMIGRATION CONTROL LAW - CONVENTION RELATING TO THE STATUS OF REFUGEES – PROTOCOL RELATING TO THE STATUS OF REFUGEES - SUFFICIENT EVIDENCE PROVING FEAR OF HOMELAND PERSECUTION

**[2010Du274484 April 26, 2012]**

*Facts*

The Plaintiff from Ivory Coast applied for admission as Refugee when he entered Korea but the Minister of Justice declined his application. The original judgment found that there is no sufficient evidence that the plaintiff is under the danger of persecution. This case ruled that the original judg-

ment was legally wrong in finding the probability of persecution and had misunderstanding on the method and the measure to find the probability.

*Legal Issues*

How to make decision on the credibility of statements in a refugee application on the sufficient evidence of fear of persecution that is required for a refugee application.

*Judgment*

> According to the Immigration Control Law Article 2, Section 3 and Article 76, Section 1, the Convention Relating to the Status of Refugees Article 1, and the Protocol Relating to the Status of Refugees Article 1, the Minister of Justice should give refugee status as defined in the Convention to the foreigners present in the Republic of Korea who has sufficient evidence of fear of being persecuted for the reasons of race, religion, nationality, membership of particular social group or political opinion who cannot be protected by his or her country or does not want the protection from that country. In addition, in principle, the foreigner who applies for the refugee status should prove the 'fear of persecution with sufficient evidence.' However, depending on the special circumstance of the applicant, the Minister cannot demand the refugee to objectively prove every single factual argument. If the statements are consistent and persuasive, and if it is reasonable to decide that the statements are credible as related to taking the following factors as a whole, the Minister shall find the sufficient evidence. The factors to consider are: the course of entry to Korea; period taken to apply for refugee status after entry; the details about refugee application; the situation in the applicant's country; the applicant's subjective degree of fear; the political, social, and cultural circumstance in the region the applicant resided; and the general degree of fear the people in that region have. (See Supreme Court decision on 2007 DU 3930, July 24, 2008).

However, the Supreme Court ruled that although details in the plaintiff's statements are not consistent and some of them are not coherent with the evidence he presented, it is difficult to reject the credibility of the whole factual arguments. In addition, considering all the different matters, the court ruled that if the plaintiff is deported back to his country, it is reasonable to conclude that there is a possibility of persecution based on his race or political activities and that it is hard to expect protection from his country.

> When examining the refugee applicant's statement about experience of persecution, the counselor should not wholly deny the credibility of the statements when he finds small inconsistency in details or slight exaggerations. In addition, the counselor should consider the possibility that such exaggerations and inconsistency resulted from psychological trauma from the real persecution, emotional instability due to the applicant in needy circumstance, limitation on memory as time passed, or difference in the linguistic sense from our country due to different cultural and historical background. Thus, the counselor needs to assess the core of the statements with overall consistency and credibility. Especially, if the applicant is a female claiming for serious persecution, the counselor should take consideration of the possibility and specialty of the statements when assessing the credibility. In addition, based on above mentioned assessment, if the applicant's factual arguments on the past persecution are reasonable, unless his or her country's situation has changed drastically to have clearly eradicated the possibility of the persecution, the counselor should find that there is sufficient evidence of the fear of persecution, which is the requirement for refugee application.

## PHILIPPINES

### NON-ADVERSARIAL PROCEDURE TO DETERMINE ELIGIBILITY OF PROTECTION FOR REFUGEES, STATELESS PERSONS – ACCEPTANCE OF REFUGEES WHEN NOT OPPOSED TO THE PUBLIC INTEREST – PERSONS WITHOUT NATIONALITY – ADHERENCE TO UN CONVENTIONS

**Establishing the Refugee and Stateless Status Determination Procedure**

In 2012, the Department of Justice issued Department Circular No. 058 to establish a refugee and stateless status determination procedure. The Philippines has acceded to the 1951 UN Convention Relating to the Status of Refugees, its 1967 Protocol, and the UN Convention Relating to the Status of Stateless Persons. Under Commonwealth Act No. 613, also known as "the Philippine Immigration Act of 1940," refugees for religious, political, or racial reasons may be admitted to the Philippines for humanitarian reasons and when not opposed to the public interest. The immigration law also allows admission of persons without nationality as immigrants.

The circular reasoned that it is essential to strengthen the procedure to determine eligibility of protection for refugees and establish a procedure to determine eligibility of protection for stateless persons consistent with the above treaties. It set out definitions consistent with the treaties and established a Refugee and Stateless Persons Protection Unit in the Legal Staff of the Department of Justice (Sec. 1, Sec. 5). The objective is to establish a fair, speedy and non-adversarial procedure to facilitate identification, treatment, and protection of refugees and stateless persons consistent with the laws, international commitments and humanitarian traditions and concerns of the Philippine Republic (Sec. 2).

What follows are some of the highlights of the procedure. The procedure is governed by the basic principles of preservation and promotion of family unity; non-detention on account of being stateless or refugee; non-deprivation of status and non-discrimination in the application of the treaties; *non-refoulement*, especially during the pendency of the application of the applicant and/or his/her dependents; and non-punishment of the applicant and/or his/her dependents on account of illegal entry or presence, provided they present themselves without delay to authorities and/or shows good cause for illegal entry or presence (Sec. 3). The procedure is administrative in nature and priority is given to refugee status determination (Sec. 8). The burden of proof is shared (Sec. 9), and applicants are given rights (Sec. 10). An unfavorable decision may be requested for reconsideration (Sec. 13), and an applicant may seek judicial review of a decision or resolution (Sec. 20). Under certain conditions, a refugee or stateless person may be removed from Philippine territory (Sec. 30). The procedure also covers processes related to exclusion, cancellation, revocation, and cessation of refugee status.

# ASEAN

## INDONESIA

### ASEAN – HOST COUNTRY AGREEMENT

Presidential Regulation No. 99 of 2012 on the Ratification Agreement between the Government of the Republic of Indonesia and the Association

of Southeast Asian Nations (ASEAN) on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat

In Phnom Penh, Cambodia, on April 2, 2012, the Government of the Republic of Indonesia has signed an agreement with ASEAN concerning hosting and granting privileges and immunities to the ASEAN Secretariat. This agreement is later ratified by Presidential Regulation No. 99 of 2012 in Jakarta, on November 17, 2012, by the President of the Republic of Indonesia, Susilo Bambang Yudhoyono, and placed on the statute book in Jakarta, on November 19, 2012 by Ministry of Law and Human Rights, Amir Syamsudin. At the time of the enactment of this Presidential Regulation, the former Presidential Regulation ratifying the Agreement between the Government of Indonesia and the ASEAN relating to the Privileges and Immunities of the ASEAN Secretariat (Presidential Regulation No. 9 of 1979) is revoked and declared invalid. According to the Agreement, ASEAN have the juridical capacity under Indonesian laws to enter into contracts; acquire and dispose of movable and immovable properties in accordance with the laws and regulations of Indonesia; and institute and defend itself in legal proceedings. For that purpose, the Secretary-General, Deputy Secretaries-General or any member of the Staff of the Secretariat, authorized by the Secretary-General, in accordance with ASEAN rules shall represent ASEAN.

## DISPUTE SETTLEMENT – ASEAN MECHANISM ON NON-COMPLIANCE RULES

### Instrument of Incorporation of the Rules for Reference of Non-Compliance to the ASEAN Summit to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms

Referring to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (Protocol) which was signed on April 8, 2010 but has not entered into force, and Rules for Reference of Non-Compliance to the ASEAN Summit which was adopted by the ASEAN Foreign Ministers in Phnom Penh, Cambodia, on April 2, 2012, Indonesia and other ASEAN Member States have agreed that the Rules for Reference of Non-Compliance to the ASEAN Summit, which is Annex of the Instrument, shall be incorporated as Annex 6 to the Protocol. Article 2 of the Instrument states that the Instrument enters into force upon signature, which was on April 2, 2012.

There is no need of ratification of this Instrument. Consequently, Annex 6 to the Protocol shall apply upon the entry into force of the Protocol. Indonesia has been ratified the Instrument through Presidential Regulation No. 71 of 2014.

**ASEAN – RATIFICATION – DIPLOMATIC IMMUNITY – PRIVILEGES**

### Presidential Regulation No. 20 of 2012 on Ratification of Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations (Regulation 20/2012)

Regulation 20/2012 was enacted to ratify the Agreement on the Privileges and Immunities of the ASEAN that has been signed in Cha-am Hua Hin, Thailand on October 25, 2009. The Agreement itself contains that ASEAN and the property and assets of ASEAN shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity and the premises of ASEAN shall be inviolable. The property and assets of ASEAN shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action. Furthermore, the property and assets of ASEAN shall be exempt from all direct taxes, customs duties and prohibitions and restrictions on imports and exports

**ASEAN – ASEAN DECLARATION ON HUMAN RIGHTS – RECOGNITION OF THE DECLARATION**

### ASEAN Declaration on Human Rights, November 18, 2012

Indonesia signed the ASEAN Declaration on Human Rights on November 18, 2012 in Phnom Penh, Cambodia. There is no need for ratification of this Declaration. The Parties, through the Declaration, have agreed on the general principles as its scope regarding the civil and political rights; economic, social and cultural rights; right to development; right to peace; and cooperation in the promotion and protection of human rights. ASEAN human Rights Declaration is a commitment of ASEAN Member States in establishing a framework for human rights cooperation in the region and contributes to the ASEAN community building process. In Indonesia, domestic Human Rights Commission has been established since 1993 and has been dealing with many human rights cases in the past 20 years.

# Arbitration

## INDIA

### SCOPE AND APPLICABILITY SECTION 2(2) OF INDIAN ARBITRATION AND CONCILIATION ACT, 1996 – UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION – ENFORCEMENT OF ARBITRAL AWARDS

***Bharat Aluminium Company v. Kaiser Aluminium Technical Service, Inc.*** **[Supreme Court of India, 6 September 2012 http://JUDIS.NIC.IN]**

*Facts*

This case dealt with the interpretation and application of Section 2(2) in Part I of the Indian Arbitration and Conciliation Act, 1996 (Indian Act) which, *inter alia*, provided that "[t]his Part shall apply where the place of arbitration is in India." Part I of Indian Act provided for various aspects of conduct of arbitration within India. Part II provided for the recognition and enforcement of arbitration awards, and it applied to both national and international arbitrations. For more than a decade, Indian courts, particularly the Indian Supreme Court, considered the scope and application of Section 2 (2) to arbitrations held not only in India as per Part I of the Indian Act but also to those arbitrations held outside India. The Indian Supreme Court in *Bhatia International v. Bulk Trading S.A & Another* (2002) SCC 105 considered the scope of Section 2(2) of the Indian Act and held that Part I would also apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. The decision of this case was followed in *Venture Global Engineering v. Satyam Computer Services Ltd. & Another* (2008) (1) Scale 214. However, there were differences among judges about the interpretation and scope of applicability of Section 2(2) of the Indian Act, and therefore, it was taken before the Constitution bench of the Supreme Court for the purpose of obtaining a conclusive interpretation.

There were several cases involving arbitration proceedings that were pending before the various courts within India under the Indian Act. So, a conclusive interpretation on the scope of Section 2(2) was crucial. Five legal questions were placed before the court, and these were: (a) what is meant by the place of arbitration as found in Sections 2(2) and 20 of the

Arbitration Act, 1996?; (b) what is the meaning of the words "under the law of which the award is passed" under Section 48 of the Arbitration Act, 1996 and Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)?; (c) does Section 2(2) bar the application of Part I of the Arbitration Act, 1996 (Part I for brevity) to arbitrations where the place is outside India?; (d) does Part I apply at all stages of an arbitration, i.e., pre-, during, and post-stages of the arbitral proceedings, in respect of all arbitrations, except for the areas specifically falling under Parts II and III of the Arbitration Act, 1996 (Part II and Part III)?; and (e) whether a suit for preservation of assets pending an arbitration proceeding is maintainable?

*Judgment*

The Court noted the arguments that the Indian Arbitration and Conciliation Act, 1996 had been based on the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. The Court also noted the arguments that the Indian Act had not "adopted or incorporated the provisions of Model Law" and that it had merely "taken into account" the Model Law.[3] It was further argued that the Indian Act had not adopted the territorial criterion/principle completely, and party autonomy had been duly recognized.

The Court briefly outlined the history and evolution of arbitration as a mechanism in India. It stated,

> Resolution of disputes through arbitration was not unknown in India even in ancient times. Simply stated, settlement of disputes through arbitration is the alternate system of resolution of disputes

3 References were also made to earlier jurisprudence of the Indian Supreme Court, namely, *Konkan Railway Corporation Ltd & Another v. Rani Construction Pvt. Ltd. and SBP & Co. v. Patel Engineering Ltd. & Another.* In these cases, it was emphasized that, in fact, the Arbitration Act, 1996 differed from the UNCITRAL Model Law on certain vital aspects. It was pointed out that one of the strongest examples was the omission of the word "only" in Section 2(2), which occurred in corresponding Article 1(2) of the Model Law. The absence of the word "only" in Section 2(2) clearly signified that Part I should compulsorily apply if the place of arbitration was in India. It did not mean that Part I would not apply if place of arbitration was not in India.

> whereby the parties to a dispute get the same settled through the intervention of a third party. The role of the court is limited to the extent of regulating the process. During the ancient era of Hindu Law in India, there were several machineries for settlement of disputes between the parties. These were known as *Kulani* (village council), *Sreni* (corporation) and *Puga* (assembly). Likewise, commercial matters were decided by Mahajans and Chambers. The resolution of disputes through the panchayat was a different system of arbitration subordinate to the courts of law. The arbitration tribunal in ancient period would have the status of panchayat in modern India. The ancient system of panchayat has been given due statutory recognition through the various Panchayat Acts subsequently followed by Panchayati Raj Act, 1994. It has now been constitutionally recognized in Article 243 of the Constitution of India.[4]

The Indian Arbitration Act of 1940 presented several difficulties. Arbitration proceedings were challenged in the courts without exception. In this context, the Court narrated the emerging international scenario with specific reference to recognition and enforcement of arbitral awards. The Court stated,

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4 Referring to the evolution of the Indian law on Arbitration, the court noted, "The first Indian Act on Arbitration law came to be passed in 1899 known as Arbitration Act, 1899. It was based on the English Arbitration Act, 1899. Then came the Code of Civil Procedure, 1908. Schedule II of the Code contained the provisions relating to the law of Arbitration which were extended to the other parts of British India. Thereafter the Arbitration Act, 1940 (Act No.10 of 1940) (hereinafter referred to as the "1940 Act") was enacted to consolidate and amend the law relating to arbitration. This Act came into force on 1st July, 1940. It is an exhaustive Code in so far as law relating to the domestic arbitration is concerned. Under this Act, Arbitration may be without the intervention of a Court or with the intervention of a Court where there is no suit pending or in a pending suit. This Act empowered the Courts to modify the Award (Section 15), remit the Award to the Arbitrators for reconsideration (Section 16) and to set aside the Award on specific grounds (Section 30). The 1940 Act was based on the English Arbitration Act, 1934. The 1934 Act was replaced by the English Arbitration Act, 1950 which was subsequently replaced by the Arbitration Act, 1975. Thereafter the 1975 Act was also replaced by the Arbitration Act, 1979. There were, however, no corresponding changes in the 1940 Act. The law of arbitration in India remained static."

Difficulties were also being faced in the International sphere of Trade and Commerce. With the growth of International Trade and Commerce, there was an increase in disputes arising out of such transactions being adjudicated through Arbitration. One of the problems faced in such Arbitration, related to recognition and enforcement of an Arbitral Award made in one country by the Courts of other countries. This difficulty was sought to be removed through various International Conventions. The first such International Convention was the Geneva Protocol on Arbitration Clauses, 1923, popularly referred to as "the 1923 Protocol". It was implemented w.e.f. 28th July, 1924. This Protocol was the product of the initiative taken by the International Chamber of Commerce (ICC) under the auspices of the League of Nations. The 1923 Protocol sought to make arbitration agreements and arbitration clauses in particular enforceable internationally. It was also sought to ensure that Awards made pursuant to such arbitration agreements would be enforced in the territory other than the state in which they were made. The 1923 Protocol proved to be inadequate. It was followed by the Geneva Convention on the execution of Foreign Arbitrated Awards, 1927 and is popularly known as the "Geneva Convention of 1927". This convention was made effective on 25th July, 1929. India became a signatory to both the 1923 Protocol and the 1927 Convention on 23rd October, 1937. It was to give effect to both the 1923 Protocol and 1927 Convention that the Arbitration (Protocol and Convention) Act, 1937 was enacted in India. Again a number of problems were encountered in the operation of the 1923 Protocol and the 1927 Geneva Convention. It was felt that there were limitations in relation to their fields of application. Under the 1927 Geneva Convention a party in order to enforce the Award in the Country of an origin was obliged to seek a declaration in the country where the arbitration took place to the effect that the Award was enforceable. Only then could the successful party go ahead and enforce the Award in the country of origin. This led to the problem of "double exequatur," making the enforcement of arbitral awards much more complicated. In 1953 the International Chamber of Commerce promoted a new treaty to govern International Commercial Arbitration. The proposals of ICC were taken up by the United Nations Economic Social Council. This in turn led to the adoption of the convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York in 1958 (popularly known as the New York Convention). The New York Convention is an improvement on the Geneva Convention of 1927. It provides for a much more simple and effective method of recognition and

> enforcement of foreign arbitral awards. It gives much wider effect to the validity of arbitration agreement. This convention came into force on 7th June, 1959. India became a State Signatory to this convention on 13th July, 1960. The Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention. Thus prior to the enactment of the Arbitration Act, 1996, the law of Arbitration in India was contained in the Protocol and Convention Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961. There were no further amendments in the aforesaid three acts. Therefore, it was generally felt that the arbitration laws in India had failed to keep pace with the developments at the international level.

New Arbitration Law based on the UNCITRAL Model Law was introduced in India in 1996 to bring in a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.[5] The Court also noted and outlined the context in which UNCITRAL Model Law was adopted in 1985. According to the Court:

> Internationally, the Arbitration Law developed in different countries to cater for the felt needs of a particular country. This necessarily led to considerable disparity in the National Laws on arbitration. Therefore, a need was felt for improvement and harmonization as National Laws which were, often, particularly inappropriate for resolving international commercial arbitration disputes. The explanatory note by the UNCITRAL Secretariat refers to the recurring inadequacies to be found in outdated National Laws, which included provisions that equate the arbitral process with Court litigation and fragmentary provisions that failed to address all relevant substantive law issues. It was also noticed that "even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind." It further mentions that "while this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs

5 The Arbitration Act, 1996 is divided into four parts. Part I which is headed "Arbitration;" Part II which is headed "Enforcement of Certain Foreign Awards;" Part III which is headed "Conciliation" and Part IV being "Supplementary Provisions."

> of modern practice are often not met." There was also unexpected and undesired restrictions found in National Laws, which would prevent the parties, for example, from submitting future disputes to arbitration. The Model Law was intended to reduce the risk of such possible frustration, difficulties or surprise. Problems also stemmed from inadequate arbitration laws or from the absence of specific legislation governing arbitration which were aggravated by the fact that National Laws differ widely. These differences were frequent source of concern in international arbitration, where at-least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. It was found that obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances, often expensive, impractical or impossible.

***Decision***

Comparing Indian law and the UNCITRAL Model Law, the Court noted that the world "only" was conspicuously missing from Section 2(2) which was included in Article 1(2) of the UNCITRAL Model Law. This indicated, the Court noted, that applicability of Part I would not be limited to arbitrations which took place within India. Referring to the UNCITRAL preparatory notes and contextualizing it with the 1996 Indian Act, the Court observed:

> It was felt necessary to include the word "only" in order to clarify that except for Articles 8, 9, 35 & 36 which could have extra territorial effect if so legislated by the State, the other provisions would be applicable on a strict territorial basis. Therefore, the word "only" would have been necessary in case the provisions with regard to interim relief etc. were to be retained in Section 2(2) which could have extraterritorial application. The Indian legislature, while adopting the Model Law, with some variations, did not include the exceptions mentioned in Article 1(2) in the corresponding provision Section 2(2). Therefore, the word "only" would have been superfluous as none of the exceptions were included in Section 2(2).

The Court concluded, after referring to the notes prepared by the UNCITRAL Secretariat on this issue, that "the omission of the word 'only,' would show that the Arbitration Act, 1996 has not accepted the territorial principle. The Scheme of the Act makes it abundantly clear that the territorial principle, accepted in the UNCITRAL Model Law, has been adopted by the Arbitration Act, 1996." The Court, for these reasons, did not support the

conclusion reached in *Bhatia International* and *Venture Global Engineering* that Part I would also apply to arbitrations that did not take place in India. The Court also noted that the India was not the only country to drop the word "only" as provided in the UNCITRAL Model Law. Switzerland and the United Kingdom, the Court pointed out, had dropped this reference to "only." The Court, accordingly, concluded,

> We are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.[6]

## INDONESIA

### ARBITRATION – CASE BEFORE ICSID CONCERNING CLAIM FROM CHURCHILL MINING

**Presidential Regulation No. 78 of 2012 on the Assignment of Minister of Law and Human Rights, Minister of Internal Affairs, Attorney General, and Head of Capital Investment Coordinating Board as Legal Counsel of the President of the Republic of Indonesia in Handling Arbitration Claim in the International Centre for Settlement of Investment Disputes**

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6 The Court also explained further that, "The judgment in Bhatia International (*supra*) was rendered by this Court on 13th March, 2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engineering (*supra*) has been rendered on 10th January, 2008 in terms of the ratio of the decision in Bhatia International (*supra*). Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."

**with regards to the Claim of Churchill Mining to the Government of the Republic of Indonesia**

In preparing the proceeding at the International Centre for Settlement of Investment Disputes (ICSID) with regards to Churchill Mining claim against Indonesian Government, Presidential Regulation No. 78 of 2012 assigns the Minister of Law and Human Rights, Minister of Internal Affairs, Attorney General, and Head of Capital Investment Coordinating Board as the Legal Counsel Team of Indonesia, coordinated by the Minister of Law and Human Rights. In this case, they have the powers to designate the constituent subdivision, the local government of Kutai Timur as a party to arbitration process in ICSID; to declare that ICSID does not have the power or the jurisdiction to settle the dispute resulting from a decision of Indonesian administrative court; to appoint an arbiter who will represent Indonesian Government in ICSID arbitration forum; to appoint legal counsel to be positioned as Assistant Team; and to form a Supporting Team. In carrying out its duty, the Legal Counsel Team coordinates with the Coordinating Minister for Political, Law, and Security Affairs, Minister of Foreign Affairs, Minister of Finance, and Regent of Kutai Timur.

## PHILIPPINES

### ARBITRATION – ENFORCEMENT OF AN ARBITRAL AWARD – APPLICABILITY OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

***Tuna Processing, Inc. v. Philippine Kingford, Inc.*** **[G.R. No. 185582. 29 February 2012]**

In 2003, Kanemitsu Yamaoka (licensor), co-patentee of U.S. Patent No. 5,484,619, Philippine Letters Patent No. 31138, and Indonesian Patent No. ID0003911 ("Yamaoka Patent"), and five Philippine tuna processors, namely, Angel Seafood Corporation, East Asia Fish Co., Inc., Mommy Gina Tuna Resources, Santa Cruz Seafoods, Inc., and respondent Kingford (sponsors/licensees) entered into a memorandum of agreement (MOA). The parties also executed a supplemental MOA and an agreement to amend the MOA. The licensees withdrew from Tuna Processing, Inc. (TPI) and

reneged on their obligations. TPI submitted the dispute for arbitration before the International Center for Dispute Resolution in the State of California, United States, and won against the respondent.

TPI filed a petition to enforce the award. The lower court dismissed the petition on the ground that it lacked legal capacity to sue in the Philippines. The petitioner counters, however, that it is entitled to seek for the recognition and enforcement of the subject foreign arbitral award in accordance with Republic Act No. 9285 (Alternative Dispute Resolution Act of 2004), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards drafted during the United Nations Conference on International Commercial Arbitration in 1958 (New York Convention), and the UNCITRAL Model Law on International Commercial Arbitration (Model Law), as none of these specifically requires that the party seeking for the enforcement should have legal capacity to sue. The Supreme Court held that inmasmuch as the Alternative Dispute Resolution Act of 2004, a municipal law applied. It did not see the need to discuss compliance with international obligations under the New York Convention and the Model law since they both already formed part of the law.

A foreign corporation not licensed to do business in the Philippines has legal capacity to sue under the provisions of the Alternative Dispute Resolution Act of 2004. Among others, the Court reasoned that the law provides that the opposing party in an application for recognition and enforcement of the arbitral award may raise only those grounds that were enumerated under Article V of the *New York Convention*. Assuming that the lower court correctly observed that the *Model Law*, not the *New York Convention*, governs the subject arbitral award, petitioner may still seek recognition and enforcement of the award in Philippine court, since the *Model Law* prescribes substantially identical exclusive grounds for refusing recognition or enforcement. Other arguments of respondent were disposed of as unmeritorious.

# Criminal Law

## BANGLADESH

### FORCED LABOUR – INTERNATIONAL COOPERATION FOR THE SUPPRESSION OF HUMAN TRAFFICKING – CROSS-BORDER INVESTIGATION – TRANSNATIONAL ORGANISED CRIME

**The Human Trafficking Deterrence and Suppression Act 2012 (Act 3 of 2012) – enacted for combating trafficking and to provide for provisions in line with international instruments dealing with human trafficking as an organized crime – relied on the UN Human Trafficking Protocol, 2000 and also complied with the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, and the UN Convention against Transnational Organized Crime 2000.**

On 20 February 2012, Bangladesh Parliament enacted the Prevention and Suppression of Human Trafficking Act 2012 (hereafter PSHT Act) to provide for a legal regime to combat human trafficking effectively, whether internal or cross-border, and to protect trafficking victims. The Act of 2012 is indeed an attempt to enact anti-trafficking provisions at par with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000 (Palermo Protocol), which is not ratified by Bangladesh though. The Act also seems to be informed of the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, and the UN Convention against Transnational Organized Crime 2000,[7] ratified by Bangladesh. In particular, the obligations prescribed in SAARC anti-trafficking Convention have been accommodated in the PSHT Act, although the Act does not cite the instrument.

The preamble of the PSHT Act of 2012 clearly says that its aim is to provide for provisions against the transnational organised crime of human trafficking and for the protection of trafficking victims in line with the globally agreed standards.

7 Ratified on 13 July 2011. The PSHT Act is also informed of other instruments such as CEDAW and CRC that provide obligations to combat trafficking in women and children.

Accordingly, the definition of human trafficking provided in section 3 of the Act of 2012 largely draws upon the definition in the Human Trafficking Protocol 2000. According to section 3,

1. "Human trafficking" means the selling or buying, recruiting or receiving, exporting or transferring, sending or confining or harbouring of any person, either inside or outside of the territory of Bangladesh, for the purpose of sexual exploitation or oppression, labour exploitation or any other form of exploitation[8] or oppression by means of –

    a) threat or use of force; or
    b) deception or abuse of his or her socio-economic or environmental or other types of vulnerability; or
    c) giving or receiving money or benefit to procure the consent of a person having control over him or her.[9]

According to section 3(2), if any child is trafficked, the Prosecution will not have to prove whether the trafficked-child was threatened or forced/coerced or abducted or kidnapped or deceived while trafficking occurred, or whether the victim had consented or not.

In addition, the *Explanation* to section 3 further provides that, if any person with a criminal intention induces or helps any other person to move or emigrate for work or service and with the knowledge that such other person would be put into exploitation or exploitative labour conditions, then the first-mentioned person shall be guilty of human trafficking. The section applies whether the victim has migrated within the country or to a foreign country.

Salient features of the PSHT Act 2012 can be surmised as follows:

a) Under section 6(2), the punishment for the offence of human trafficking committed not as an organized crime is imprisonment for life or a rigorous imprisonment of any other term being not below five years, and also a fine of minimum of taka 50,000 (taka fifty

8 For the purpose of § 3, 'exploitation' has been defined in § 2(15) of the Act, which includes a number of forms such as exploitation through prostitution, forced labour or debt-bondage, or exploitation through fake marriage and so on.

9 Unofficial English translation. Cf this with Article 3 of the UN Trafficking Protocol of 2000.

thousand). When the trafficking offence is committed by several members of any organized criminal group, according to section 7, the punishment (for each member of the group) is the death penalty or an imprisonment for life or a rigorous imprisonment of a minimum of seven years along with a fine of minimum of taka 500,000.

b) To provoke, instigate, conspire or attempt to commit an offence, or to knowingly allow one's property to be used in the commission of or facilitation for committing any such offence, or to receive, cancel, conceal, remove, or take possession of any document for the said purpose is a punishable offence according to section 8(1). The punishment is imprisonment for a minimum of three years to a maximum of seven years, and a fine of minimum of 20,000 taka.[10]

c) Section 9 criminalises independently the act of engaging others in "forced labour", while sections 11 - 13 provide for certain ancillary offences relating to the prostitution and keep brothels with a view to stopping the demand-side of human trafficking.

d) The Act applies extra-territorially irrespective of where the trafficking offence is committed, if the victims or the perpetrators are Bangladeshi nationals (sec. 5).

e) The Act establishes a specialist Tribunal for the prompt trial of trafficking offences, with wide powers being assigned. The Tribunal can record evidence beyond the court premises, award civil compensation in addition to fines, issue protective measures for the protection of victims including control order attaching conditions while granting bail to the accused, and may admit as evidence electronically-held materials or witness statements including those obtained in a foreign country (secs. 21-22, 28 to 30).

10 According to § 8(2), if anyone abets an offence under the PSHT Act including the offence of human trafficking, he or she shall be liable to a punishment equal to the one provided for the offence abetted.

f) The Act empowers the Tribunal to freeze and confiscate the assets of the offender (the trafficker), and lays down that such assets seized may be used to support the victims of trafficking (sec. 27).

g) The Police may initiate preventive searches or inquiry, and may conduct cross-border investigation (secs. 19-20), while international cooperation for the suppression of human trafficking including the conclusion by the Government of bilateral mutual legal assistance treaties is envisaged in section 41. It further requires public-private partnership regarding the prosecution of traffickers and the rescue, repatriation, and rehabilitation of victims (sec. 32).

h) The Act provides detailed provisions for the protection of victims including the identification, rescue, repatriation, rehabilitation, and reintegration into society of trafficking victims. It contains provisions requiring measures for the establishment of more protective homes, for reimbursement of the reasonable costs incurred by the victims and witnesses, and for legal aid and court-ordered compensation (secs. 32-40).

i) The Act mandates special protection to women, children and persons who lack adequate working capacity (secs. 25-26, 20, 32, & 38), and requires strict adherence by all concerned to privacy and dignity of the victims. There is also a protection against re-victimisation of the victim and a guarantee of the victim's right to information.

j) It provides for the creation of a central Anti-Trafficking Fund (sec. 42) for the wider protection of trafficking victims and also envisages the establishment of an Anti-Human-Trafficking Authority for the implementation of the Act.

**BILATERAL OR MULTILATERAL TREATY – MONEY-LAUNDERING – MUTUAL LEGAL ASSISTANCE – EXTRA-TERRITORIAL INJUNCTION**

**The Prevention of Money Laundering Act 2012 (Act 5 of 2012) – an Act that maintains standards articulated in international instruments namely the International Convention for the Suppression of the Financing of Terrorism 1999 and the United Nations Convention against Corruption 2003.**

Bangladesh Parliament enacted *the Prevention of Money Laundering Act 2012,* which came into force on 20 February 2012*,* to provide for the rules to prevent and criminalize money laundering.[11] The Act builds on previous enactments, but heralds a novel improvement in that it now seeks to prevent the financing of terrorism by countering money laundering. As such, although the Act does not specify this in the preamble or anywhere else in the text, it is basically enacted to legislate modern provisions commensurate with a number of international instruments including the International Convention for the Suppression of the Financing of Terrorism 1999, and the United Nations Convention against Corruption 2003 (UNCAC) (both are acceded by Bangladesh respectively on 26 August 2005 and on 27 February 2007).[12] The Prevention of Money-laundering Act 2012 establishes a link between measures to combat corruption and the anti-money laundering regimes it introduces.

The Act of 2012 criminalises the act of money laundering (sec. 4), and defines money laundering in an inclusive fashion in section 2(a).[13] The punishment for the offence of money laundering (or for an attempted offence or for abetment) is an imprisonment, which may extend to 12 years, but shall not be less than four years. In addition to imprisonment, the offender shall be liable to a fine of taka 10,000,00 or double the amount

11 It repealed the *Prevention of Money Laundering Act 2009*.

12 The UNCAC is one of the most comprehensive anti-corruption instruments, criminalising money-laundering (Art. 23). The Convention provides provisions for dealing with the proceeds of corruption (Art. 14).

13 Money-laundering has been defined as money or property sent or preserved abroad in breach of the existing law of the country, the money that has not been sent back to the country after being due to be so remitted, and the money that has been unduly overpaid abroad.

that has been laundered, whichever is greater. The property in respect of which the offence has been committed is subject to be confiscated in favour of the state (sec. 4).

Certain financial institutions are obliged to take actions to prevent money laundering. These institutions are banks, non-banking financial institutions, insurance companies, money-exchangers, any company or institution dealing in the remittance of money and any other institution doing business with the approval of Bangladesh Bank, the central bank of the country. Under section 25, these reporting institutions, have a duty to:

(i) maintain and preserve complete information of their clients,

(ii) preserve, for a minimum period of 5 years, all information of a closed account of any client,

(iii) send the above information to the Bangladesh Bank as and when required by the central bank, and

(iv) report *suo motu* to the Bangladesh Bank any account if suspected to be engaged in money laundering.

Section 25 (2) provides that, a breach of this obligation may lead to the imposition by the Bangladesh Bank of a penalty of maximum taka 25,00,000 and of a minimum of taka 50,000. Additionally, the license of the recalcitrant institution or that of any of its branch or both may also be cancelled by the central bank or by the licensing authority (sec. 25 (2)).

Section 23 provides for functions and obligations for the central bank. The section has imposed a duty on the Bangladesh Bank to suppress and prevent money laundering, a duty that is facilitated by a power of inspection of banks, power to request information as to any suspect transaction, to stop the operation of any bank account in which any laundered money is reasonably suspected to be deposited. The Bangladesh Bank is mandated, among other things, to monitor and scrutinize the information maintained and supplied by the reporting institutions, to restrict the operation of any account suspected to be engaged in money laundering, and to call for information and so on.

The Act further requires that the Bangladesh Bank will establish a Bangladesh Financial Intelligence Unit (BFIU), to which government and

autonomous bodies/entities may, upon requisition or on their own, supply necessary information. The BFIU may share information under its disposal with other law-enforcing agencies (sec. 24).[14]

The offence of money laundering is to be investigated by the Anti-Corruption Commission (ACC) or by an officer of any other investigating agency duly authorized by the ACC (sec. 9(1)). The special court[15] is empowered to try the offence of money laundering and other allied offences, but it take cognizance of an offence only upon an approval of the ACC (sec. 12). The special court is empowered to issue injunctions freezing and attaching property connected with the commission of money-laundering offence, whether the property is situated within the country or in a foreign land (secs. 10 & 24).[16] It can also confiscate the property in respect of which the offence has been committed. Its judgments are appealable to the High Court Division of the Supreme Court (sec. 22).[17]

Section 26 enables the Government to enter into any bi-lateral or multilateral treaty for carrying out the objectives of the Act, that is, to exchange mutual legal assistance with other countries for investigating or prosecuting the offences of money laundering. The BFIU is accordingly empowered to receive from or render to Financial Intelligence Units of other countries any assistance.

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14 A Financial Intelligence Unit (FIU) has already been installed as a wing at the central bank's Anti-Money Laundering Department. The FIU provides and collects information to or from other FIUs by virtue of bilateral arrangements.

15 This is the Court of Special Judge established under § 3 of the Criminal Law (Amendment) Act 1958 as an anti-corruption court.

16 § 16 gives a right of appeal against a freezing or/and attachment order.

17 § 15 deals with the return of freezed/attached property. §§ 17-18 lay down provisions relating to confiscation of property and about how to deal with or return confiscated property, while § 19 provides for appeal against an order of confiscation.

**TREATIES AND CONVENTIONS – STRENGTHENING LEGAL TOOLS TO COMBAT PORNOGRAPHY – PROTECTION OF CHILDREN FROM PORNOGRAPHY**

**The Pornography Control Act 2012 (Act 9 of 2012) – Act contains standards provided in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000.**

The Pornography Control Act 2012 (Act 9 of 2012), which came into force on *8 March 2012*, has been enacted to prevent degradation of social and moral values in the Bangladeshi society. This law is indeed a protective legislation that seeks to protect women and children from pornography and similar sex-based offences. The child has been defined as a person who has not attained the age of sixteen (sec. 2(e)).[18]

Although there is no direct indication in the Preamble of this statute, the Act seems to have enacted provisions in line with the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[19] The Act can be seen as an effort to comply with the observations on Bangladesh of the CRC Committee made earlier.

The definition of pornography includes production and dissemination of visual documentary, audio-visual materials, graphics, books, periodicals, leaflets, cartoons, sculpture, and imaginary statue that uses indecent dialogue or pictures, body movement, naked dances, and similar activities that may create sexual appeal/sensation (sec. 2(c)).[20]

Salient provisions of the Act are:

(a) The Act criminalises the production, marketing, preservation, supply, and buying, selling or dissemination of any pornographic item (sec. 4). Causing public nuisance by displaying pornography (sec. 8(4)), commercial and non-commercial dealing with

18 This age is less than the age of 18 prescribed in the Child Rights Convention.

19 Adopted and opened for signature, ratification and accession by the General Assembly resolution A/RES/54/263 of 25 May 2000. Entered into force on 18 January 2002. Ratified by Bangladesh on 6 September 2000.

20 Unofficial English Translation of the Act is used.

pornography in any manner or advertising of the place where pornography is available are also punishable offences (sec. 8(5)).

(b) If any persons gets involved in producing pornography or if any person forces any other person (man, woman, or child) to engage in the production of pornography or if any person records any video or shots any naked picture of any other person, with or without the consent of the participant/victim, he or she will be punished with a rigorous imprisonment of 7 years and with a fine of taka maximum two hundred thousand (sec. 8(1)).

(c) The Act provides for punishment for causing harm to social reputation or personal integrity of any person or for causing mental torture to him/her or for taking any monetary or other undue advantage by blackmailing through pornography of any person. The punishment is a rigorous imprisonment for a term which may extend to five years and a fine which may extend to taka 2, 00,000 (sec. 8(2)).

(d) It further criminalises the use of internet, websites, or any other electronic devices such as the mobile phones to disseminate pornography. The penalty is 5 years and a fine of taka maximum two hundred thousand (sec. 8(3)). Notably, it provides for severe punishment for the use of children for the production/dissemination/supply of pornography as well for dealing in any way with child pornography, by prescribing an imprisonment of 10 years and a fine of taka not exceeding five hundred thousand (sec. 8(6)).

## INDONESIA

### CRIMINAL LAW – LAW ENFORCEMENT – MUTUAL LEGAL ASSISTANCE COOPERATION – RATIFICATION

**Act No. 3 of 2012 on Ratification of the Agreement between the Government of the Republic of Indonesia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters (Act 3/2012)**

The developments in science and technology, particularly in the fields of transportation, communication, and information, has resulted in a cross-country relationship as if it indefinitely so as to facilitate the mobilization of people and the movement of goods from one country to another can be done quickly.[21] Concern about the emergence of cross-jurisdictional criminal act is inevitable. One of the mitigation and treatment efforts is cooperation between countries both bilaterally and multilaterally. The Government of the Republic of Indonesia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China agreed on mutual legal assistance cooperation and has been signed on April 3rd, 2008 in Hong Kong. The aim of this agreement is to enhance the effectiveness of cooperation in the prevention and combating of crime, especially transnational crime, approval mutual legal assistance in criminal matters must consider the general principles of international law which focuses on the principles of respect for state sovereignty and the rule of law, equality and mutual benefit, and refer on the principle of dual criminality.[22]

The scope of the legal assistance that could be possibly given upon this agreement are namely taking evidence from both countries; giving the information, notes, and evidence; investigation or identification on person or good; giving the documents; and execution of search and seizure requests; regulation for people who provide the evidence on assistance in

21 Indonesia, *Act No. 3 of 2012 on Ratification of Agreement Between the Government of the Republic of Indonesia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters, State Gazette of Republic of Indonesia Yea*r 2012 No. 85, Supplement to State Gazette of Republic of Indonesia Number 5301, Preamble, para 2.

22 *Id*. para 5.

investigation, prosecution or criminal proceedings; tracking, detention, seizure, confiscation and return of result of crime; other necessary legal assistance by the Requesting Party according to the agreement and Requesting Party's law. The limitation of this agreement apply on legal assistance related to politic and military crime, nebis in idem, not a dual criminality; the reasons could or possibly harm the security and the Requesting Party; related to the confidentiality of bank and financial bodies or related to fiscal matters; or the execution of legal assistance could harm the ongoing criminal proceedings in the Requesting Party.

## Diplomatic and Consular

### CHINA

#### PRIVILEGES – LIBYA – LIBYA CRISIS – VIENNA CONVENTION ON DIPLOMATIC RELATIONS

**Inviolability of personnel and property of diplomatic missions**

On February 7, 2012, a Foreign Ministry spokesperson made a statement on the assault by protesters against the Chinese Embassy in Libya.

> China has expressed strong concerns over the assault against the Chinese Embassy in Libya and lodged representations to the Libyan side. In accordance with the Vienna Convention on Diplomatic Relations and other relevant international law, the receiving state has the duty to ensure the inviolability of personnel and property of diplomatic missions of the sending state. We urge the Libyan side to take concrete and effective measures to prevent any recurrence of such incidents and ensure the safety of Chinese personnel and institutions in Libya.[23]

23 *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on February 7, 2012*, Generalkonsulat der Volksrepublik China in Frankfurt am Main, http://frankfurt.china-consulate.org/det/f yrth/t903639.htm.

**US-CHINA RELATIONS – EMBASSY**

### The CHEN Guangcheng incident

On May 2, 2012, a Foreign Ministry spokesperson made a statement on CHEN Guangcheng's entering the US Embassy in China.

> According to our knowledge, Chen Guangcheng, a native of Yinan county, Shandong Province, entered the US Embassy in China in late April, and left of his own volition after a six-day stay. It should be pointed out that the US Embassy in China took Chen Guangcheng, a Chinese citizen, into the Embassy via abnormal means, with which China expresses strong dissatisfaction. The US move is interference in China's internal affairs, which is completely unacceptable to China. The US Embassy in China has the obligation to abide by relevant international laws and Chinese laws, and should not engage in activities irrelevant to its duties.
>
> China demands the US to apologise for that, carry out a thorough investigation into the incident, deal with those responsible, and promise not to let similar incidents happen again. China noted that the US has expressed the importance it attaches to China's demands and concerns, and promised to take necessary measures to prevent similar incidents. The US side should reflect upon its policies and actions, and take concrete actions to maintain the larger interests of China-US relations.
>
> China emphasises that China is a country under the rule of law, and every citizen's legitimate rights and interests are protected by the Constitution and laws. Meanwhile, every citizen has the obligation to abide by the Constitution and laws.[24]

**US-CHINA RELATIONS – PUBLIC SECURITY – POLITICAL RIGHTS**

### The WANG Lijun case

On 17–18 September 2012, the Intermediate People's Court of Chengdu, Capital of Sichuan Province held a trial of Mr. WANG Lijun, former Vice Mayor and Chief of the Public Security Bureau of Chongqing, one of the

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24 *Foreign Ministry Spokesperson Liu Weimin's Remarks on Chen Guangcheng's Entering the US Embassy in China*, Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in Macao Special Administrative Region, http://www.fmcoprc.gov.mo/eng/gsxwfb/fyrth/ t928382.htm.

four municipalities directly under the State Council. Among others, he was charged with the crime of defection under Article 109 of the Chinese Criminal Code as he fled into the Consulate General of the USA in Chengdu on February 6, 2012 and stayed there for one day. On September 24, 2012, he was convicted of the crime of defection, as well as other crimes, including the crime of bending the law for selfish ends or twisting the law for favours, the crime of abusing powers and the crime of taking bribery. He was then sentenced to 15 years of imprisonment. Mr. Wang did not lodge an appeal.

Article 109 of the Chinese Criminal Code provides that "any State functionary who, while discharging his official duties at home or abroad, leaves his post without permission and defects to another country, which endangers the security of the People's Republic of China, shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years".[25]

## RECOGNITION – LIBYA – LIBYAN CRISIS – POLITICAL TRANSITION PROCESS

### ESTABLISHMENT OF THE NEW LIBYAN GOVERNMENT – CHINESE SUPPORT ON NEW LIBYAN GOVERNMENT

On November 2, 2012, Foreign Ministry Spokesperson Hong Lei made a statement on the establishment of the new Libyan government. He said:

> Libya's General National Congress recently voted through the make-up of the new government. China welcomes this development which represents a step forward in Libya's political transition process. As a friendly country to Libya, we wish Libya an early realisation of lasting peace, stability, prosperity and development. We stand ready to work together with Libya for the continuous advancement of China-Libya friendly relations and cooperation.[26]

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25 在法律的天平上--王立军案件庭审及案情始末, Xinhua (Sept. 19, 2012), http://news.xinhuanet.com /legal/2012-09/19/c_113136404.htm.

26 *Foreign Ministry Spokesperson Hong Lei's Remarks on the Establishment of the New Libyan Government,* Ministry of Foreign Affairs of the People's Republic of China, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t985417.shtml.

### RECOGNITION – SELF-DETERMINATION - PALESTINE – INDEPENDENT STATEHOOD

**Statement by China at the Third Committee of the 67th Session of the General Assembly**

On November 5, 2012, a Chinese representative made a statement at the Third Committee of the 67th Session of the General Assembly on Agenda Items 67(a)–(b) and 68: Elimination of Racism and Right of People to Self-determination. Regarding Palestine, she said:

> China has consistently supported the just cause of Palestine in regaining its legitimate national rights and realising its right to self-determination and to independent statehood. We support Palestine's membership in international organisations including the United Nations. We hope that the international community will have a stronger sense of responsibility and urgency regarding the Middle East Peace Process and work actively to facilitate negotiations in the interest of peace to resolve disputes through political talks, with a view to achieve lasting peace and stability in the Middle East at an early date.[27]

### KOSOVO – RECOGNITION

**UN Security Council debate on Kosovo – Questions of Kosovo must be dealt with within the framework of Resolution 1244**

On November 27, 2012, a Chinese representative made a statement at the UN Security Council debate on Kosovo:

> China has always called for full respect for the sovereignty and territorial integrity of Serbia. The question of Kosovo must be dealt with within the framework of resolution 1244 (1999). It is up to the parties concerned to find an acceptable solution through dialogue and negotiations.[28]

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27 *Statement by Ms. SHEN Siwei of the Chinese Delegation at the Third Committee of the 67th Session of the General Assembly on Agenda Item 67(a, b)& 68: the Elimination of Racism and Right of Peoples to Self-determination*, Ministry of Foreign Affairs of the People's Republic of China, http://www.china-un.org/eng/ hyyfy/t985990.htm.

28 *Statement by Ambassador Li Baodong at the Security Council Debate on Kosovo,* Ministry of Foreign Affairs of the People's Republic of China, http://

## INDONESIA

### CONSULAR RELATIONS – AGREEMENT ON FRIENDSHIP AND COOPERATION WITH AFGHANISTAN

**Agreement between the Government of the Republic of Indonesia and the Government of the Islamic Republic of Afghanistan on Friendship and Cooperation.**

This Agreement has been signed and enacted in Bali, November 9th, 2012. This Agreement has been ratified by both Parties through Presidential Regulation of the Republic of Indonesia Number 125 of 2014 and Diplomatic Note of the Islamic of Republic of Afghanistan Number 3622 on February 8th, 2014. The Agreement has been enacted for 5 (five) years and could be extended as agreed upon the Parties.

The scope of this Agreement is focusing on political cooperation; economic and trade cooperation; and academic and cultural cooperation. In the field of political cooperation both Indonesia and Afghanistan have agreed to develop the contact and communication, supporting the bilateral, regional and international dialogue; supporting the regional security cooperation, solidarity within the regional citizens and government; preserve the active cooperation between diplomatic agencies from Indonesia and Afghanistan. In the economic and trade cooperation, Indonesia and Afghanistan have agreed to promote the sustainable partnership in economic and trade relationship; and strengthen the cooperation between both Parties in financial and trade transaction. In academic and cultural cooperation, both Parties have agreed to support, promote, and strengthen the academic, research, training, cultural and tourism within Indonesia and Afghanistan.

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www.china-un.org/eng/hyyfy/t99392 6.htm.

## PHILIPPINES

### CONSULAR MATTERS – CONSULAR AGREEMENT BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE PEOPLE'S REPUBLIC OF CHINA

**Philippine Senate Resolution No. 82, 8 May 2012**

China and the Philippines signed the consular agreement on 29 October 2009. The consular post may be established with the consent of the receiving State. It applies to mainland China, the Hong Kong Special Administrative Region, and the Macao Special Administrative Region.

Under the agreement, the determination of the seat of the consular post, its classification and consular district, and other changes related thereto, shall be through consultation between the sending and receiving States. The parties mutually undertake to accord full facilities for the performance of the functions of a consular post and extend privileges and immunities to consular officers and their families. The Philippine President ratified it on 31 March 2011 and accordingly submitted it to the Senate for concurrence.

## SINGAPORE

### DIPLOMATIC RELATIONS – ESTABLISHMENT – REPUBLIC OF TOGO

On 18 June, Singapore's Ministry of Foreign Affairs announced that it had established diplomatic relations with the Republic of Togo with effect from 15 June 2012.

### DIPLOMATIC AND CONSULAR IMMUNITY – ATTACK ON US EMBASSY IN BEGANZI – CONDEMNATION

**Ministry of Foreign Affair's Statement in Reponse to the Aattack on the US Consulate in Libya, 18 Sep 2012**

In response to media queries regarding the attack on the US Consulate in the eastern Libyan city of Benghazi on 11 September 2012, which resulted in the deaths of the United States Ambassador to Libya and three other US diplomatic staff, the MFA Spokesman said:

> Singapore strongly condemns the violent attacks on the US Consulate in Benghazi that resulted in the tragic deaths of Ambassador

> Christopher Stevens and his colleagues. We express our deepest condolences and sympathies to the families and friends of the victims in their time of grief. The properties of foreign diplomatic missions and safety of foreign diplomatic staff should always be protected and guaranteed under the 1961 Vienna Convention on Diplomatic Relations.

In response to further media queries on the film "Innocence of Muslims", the MFA Spokesman said:

> Singapore also strongly condemns the video, "Innocence of Muslims", which denigrates Islam. The video is highly offensive to Muslims and Singapore deplores the actions of the makers of this insensitive video. Freedom of speech must be balanced with respect for religious sensitivities. At the same time, extreme acts by individuals should be dealt with in a calm and rational manner, and can never provide the excuse for any acts of violence.

# Environmental Law

## BANGLADESH

### ENDANGERED SPECIES OF WILD FAUNA AND FLORA – CITES – WILDLIFE

**The Wildlife (Conservation and Security) Act 2012 (Act 30 of 2012) – an Act that complies with the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), the Convention on the Conservation of Migratory Species of Wild Animals 1979 and the Convention on Biological Diversity 1992.**

Bangladesh Parliament enacted this important legislation in 2012 which came into force on 10 July 2012 by repealing the Wildlife (Preservation) Order 1973.[29]

Although there is no direct indication in this Act of 2012, the Act in effect seems to have been informed of provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973

29 President's Order No. 23 of 1973.

(CITES),[30] the Convention on the Conservation of Migratory Species of Wild Animals 1979,[31] and the Convention on Biological Diversity 1992.[32]

The Act recognises the State's constitutional duty to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life,[33] and provides a legal regime for the conservation and management of wildlife in Bangladesh as well as for the preservation and security of bi-diversity, forests, and wildlife (Preamble of the Act).[34]

Salient provisions of the Wildlife Conservation Act of 2012 are:

(a) Sections 3 & 4 provide provisions respectively for the formation of a Wildlife Advisory Board with experts on bio-diversity, forestry and wildlife preservation and a scientific committee. The functions of the Advisory Board are, for example, to (i) evaluate and advise on measures for the development and preservation of forestry, wild animals and bio-diversity, and (ii) to advise the government on various development projects relating to the preservation and development of bi-diversity, forestry, and wildlife. On the other hand, section 5 gives the duty of overall management of wildlife and of ensuring their safety to some designated government officials such as the Chief Warden, Warden, Chief Conservator of Forest and so on.

(b) Section 6 prohibits the hunting or killing of any wild-life and the capturing or uprooting of any plant described in the schedule of the Act except in accordance with the terms of a licence or permit, while section 10 provides provisions for the issue of permit, on certain specified grounds such as the scientific research, for col-

30 Ratified on 20 November 1981.

31 Bangladesh acceded to this Convention on Feb. 18, 1982, and it entered into force for the country on 1 December 2005.

32 Bangladesh ratified the Convention on May 3, 1994.

33 *See* article 18A of the Constitution of the People's Republic of Bangladesh.

34 § 2 of the Act (unofficial English translation of the text) provides for definitions of wild-life sanctuary, eco-park, eco-tourism, wet-land, bio-diversity, and wild-life and so on.

lecting, possessing or transporting any wild animal or its part, meat, trophy or incomplete trophy.

(c) Section 11 enjoins the Warden to register any wild animal or its part or trophy collected or conserved by any person living within his territorial jurisdiction.

(d) Section 12 restricts the sale or transfer of any wild animals or its part, meat, trophy or incomplete trophy (as well as any flora/plants described in the schedule or any product made therefrom) except without having a registration-certificate under this law.

(e) Sections 13, 17, 18, 19, 20, 22, & 23 authorise the government to declare any part of the forest as sanctuary, national park, community conservation area, safari park, eco-park, flora park, wildlife reproduction centre, landscape zone, corridor, buffer zone, core zone, special bio-diversity preservation area, closed forest, and as an area of national tradition, or to declare any plant as memorandum tree or a sacred tree.

(f) Section 14 spells out a number of activities that are prohibited within and with regard to wildlife sanctuary, with sanctions for the breach thereof (sec. 35). Section 14 prohibits, for example, intrusion into the wildlife sanctuary or putting therein any dumping, alien or invasive plants and so on.

(g) Section 16 provides for the management of wildlife sanctuary, while section 21 introduces the system of co-operative/participatory management, laying down provisions for the management of sanctuaries with the help of the Forest Department, people of ethnic race residing in the forest and local people. The objective is to ensure appropriate usage, preservation and administration of natural resources.

(h) The Act criminalises the killing of tigers and elephants except in the cases when a person is attacked by those animals and

there remains an imminent threat to life.[35] Causing the death of panthers, bears, samber deer, crocodiles, whales, or dolphins is also a punishable offence under section 37. Section 38 (1) & (2), provides for the penalty for killing any birds or migratory birds as described in schedule 2 of the Act as well as for dealing in the preserved birds or their meat or trophies. The punishment is one year in prison and a fine of taka maximum one hundred thousand, which will be doubled in case of repeated offence.

(i) Of other penal provisions, most notable is section 34 which provides that, if any person uses, counterfeits or alters any sign registered under section 11, or sells or buys, or exports/imports any wild animal or its part, meat, trophy or any product or any forest produce to any person other than the person having a license or permit under the Act, he will be punished with an imprisonment of one year and with a fine of taka maximum fifty thousand.[36]

(j) If any person assists or abets any person to commit an offence and the offence is committed pursuant to such assistance or abetment, he will be punished with the same penalty as is prescribed for the main offence (sec. 41).

## INDIA

### PROTECTION OF ENDANGERED SPECIES- CONVENTION ON BIODIVERSITY – PUBLIC TRUST DOCTRINE – INTER-GENERATIONAL EQUITY – ENVIRONMENTAL PROTECTION ACT, 1986

***T.N.Godavarman Thirumulpad v. Union of India & Others*** **[Supreme Court of India, 13 February 2012 http://JUDIS.NIC.IN]**

***Facts***

The Court in this case was concerned with the question whether sandalwood *(Santalum album Linn*) regarded as an endangered species, be

35 *Id.* § 36.

36 If the offence is repeated, the imprisonment will be of three years and the fine will be a maximum of two hundred thousand taka. *Id.* § 34. See also § 39 that prescribes penalties for the violation of §§ 6, 10, 11 and 12 of the Act.

declared as a "specified plant" within the meaning of Section 2 (27) and be included in the Schedule VI of The Wild Life (Protection) Act, 1972. The Court decided to examine this issue after going through various international conventions on this issue. Besides this, all unlicensed sandalwood oil industries were also sought to be brought within the purview of the order of the Court dated 30 December 2002 by which the Supreme Court had ordered the closure of all unlicensed saw mills, veneer, and plywood industries in the country. The Court also noted that there was consensus among all major sandalwood growing States and the Union of India (through its Ministry of Environment and Forests) that the export of sandalwood would be of serious threat and might lead to the extinction of the species.

References were also made to the anthropocentric and ecocentric approach, and it was also noted that anthropocentric approach would depend upon the instrumental value of life forms to human beings while ecocentric approach stressed on the intrinsic value of all life forms. Stress was laid on how the bio-diversity law departed from the traditional anthropocentric character of environmental law and that our Constitution recognizes ecocentric approach by obliging every citizen to have compassion for all living creatures, so also the preamble to Act. The Court also noted that public trust doctrine developed in *M.C. Mehta v. Kamalnath* 1997 (1) SCC 388 was based largely on anthropocentric principles, and the precautionary and polluter-pay principle, affirmed by the Supreme Court in *Vellore Citizens Welfare Forum v. Union of India and others* 1996 (5) SCC 647, were also rooted in anthropocentric principle since they too depended on harm to humans as a pre-requisite for invocation of those principles. The Court also noted the principle of sustainable development and intergenerational equity, and stated that they too pre-suppose the higher needs of human beings and lay down that exploitation of natural resources must be equitably distributed between the present and future generation. The Court also noted the view that these principles would be of no assistance when a Court is called upon to decide as to when a species had become endangered, or the need to protect irrespective of its instrumental value.

The Court referred to the Biological Diversity Act, 2002 which was enacted by the Parliament with the object of conserving biological diversity, sustainable use of its components, and for fair and equitable sharing of the benefits arising out of utilization of genetic resources. Biological diversity,

the Court pointed out, included all the organisms found on our planet viz., the plants, animals, and microorganisms. Environmental Protection Act, 1986, enacted by the Parliament, empowered the Central Government under Section 3 to take such measures for the purpose of protecting and improving the quality of environment. The Court noted that,

> When we examine all those legislations in the light of the constitutional provisions and various international conventions like Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), the Convention of Biological Diversity 1992 (CBD) evidently, there is a shift from environmental rights to ecological rights, though gradual but substantial. Earlier, the Rio Declaration on Earth Summit asserted the claim "human beings are the center of concern." U.N. Conference on Environment and Development (UNCED-1992), was also based on anthropocentric ethics, same was the situation in respect of many such international conventions that followed.

Referring to its own jurisprudence,[37] the Court observed:

> The principle of sustainable development and inter-generational equity too pre-supposes the higher needs of humans and lays down that exploitation of natural resources must be equitably distributed between the present and future generations. Environmental ethics behind those principles were human need and exploitation, but such principles have no role to play when we are called upon to decide the fate of an endangered species or the need to protect the same irrespective of its instrumental value.

The Court noted that the above principle had its roots in India, much before it was thought of in the Western world, and it pointed out that Isha-Upanishads (as early as 1500 – 600 B.C) taught us the following truth: "The universe along with its creatures belongs to the Lord. No creature is superior to any other. Human beings should not be above nature. Let no one species encroach over the rights and privileges of other species."

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37 The public trust doctrine in *M.C. Mehta v. Kamalnath* (1997) 1 SCC 388 laid down that all humans had equitable access to natural resources—treating all natural resources as property, not life. That principle also had its roots in anthropocentric principle. Precautionary principle and polluter-pays principles were affirmed by the Court in *Vellore Citizens Welfare Forum v. Union of India* and others were also based on anthropocentric principle since they also depended on harm to humans as a prerequisite for invoking those principles.

While referring to various international conventions such as Convention for conservation of Antarctic Living Resources 1980, The Protocol to Antarctic Treaty on Environmental Protection 1998, The Bern Convention on Conservation of European Wildlife and Natural Habitats 1982, CITES, and CBD, the Court pointed out:

> India is a signatory to CBD, which also mandates the contracting parties to develop and maintain necessary legislation for protection and regulation of threatened species and also regulate trade therein. CITES in its preamble also indicates that Fauna and Flora are irreplaceable part of the natural environment of the earth and international cooperation is essential for the protection of certain species against over exploitation and international trade . . . CITES, to which India is a signatory, classifies species into different appendices in the order of their endangerment, and prescribes different modes of regulation in that regard.

The court noted that the Indian sandalwood (*Santalum album Linn*) was not seen included in the species listed in Appendix-II of CITES; however, red sandalwood (*Pterocarpus Santalinus*) was seen included in Appendix-II. At the same time, International Union for Conservation of Nature (IUCN), which was an international organization dedicated to finding pragmatic solutions of our most pressing environment and development challenges, had included *Santalum album Linn* in its Red List of threatened species as "vulnerable" and red sandalwood (*Pterocarpus Santalinus*) in the Red List as "endangered." Therefore, the Court further noted, both in CITES and in the IUCN, Red List of threatened species red sandalwood was described as "threatened with extinction," "endangered." A taxon was critically endangered when the available evidence indicated that it met with the criteria of extremely high risk of extinction. It was endangered when it met with the criteria of facing a very high risk of extinction. A taxon was vulnerable when it was considered to be facing a high risk of extinction. Near threatened means a taxon was likely to qualify for a threatened category in the near future.

The Court noted that the CITES as well as IUCN had acknowledged that Red Sandalwood is an endangered species. The Court also pointed out that it was a settled law that the provisions of the Treaties/Conventions, which were not contrary to Municipal laws, be deemed to have been incorporated in the domestic law.

The Court concluded, by giving directions to the Central Government to take appropriate steps under relevant laws, as mentioned above, to safeguard Red Sanders as nowhere in the world, this species was seen, except in India. The Court also noted that "we owe an obligation to world, to safeguard this endangered species, for posterity." The Court also gave direction to the Central Government to formulae a policy for conservation of sandalwood including provision for financial reserves for such conservation and scientific research for sustainable use of biological diversity in sandalwood. The Court also concluded by expressing its view that "time has also come to think of a legislation similar to the Endangered Species Act, enacted in the United States which protects both endangered species defined as those 'in danger of extinction throughout all or a significant portion of their range' and 'threatened species,' those likely to become endangered 'within a foreseeable time.'"

## INDONESIA

### ENVIRONMENTAL LAW – POLLUTION – RATIFICATION OF ANNEXES MARPOL CONVENTION

**Presidential Regulation No. 29 of 2012 on Ratification of Annex III, Annex IV, Annex V, and Annex VI Of The International Convention For the Prevention of Pollution from Ships 1973 as Modified by the Protocol Of 1978 Relating Thereto.**

Regulation 29/2012 aims to ratify Annex III, Annex IV, Annex V, And Annex VI Of The International Convention For The Prevention Of Pollution From Ships 1973 As Modified By The Protocol Of 1978 Relating Thereto that has been accepted on November 2nd, 1973 and February 17th, 1978 as determined by the 58th Marine Environment Protection Committee (MPEC) in MPEC.176 (58) Resolution on October 10th, 2008 in London, England.

## KOREA

### INTERNATIONAL AGREEMENTS – SUSTAINABLE DEVELOPMENT - ESTABLISHMENT OF THE GLOBAL GREEN GROWTH INSTITUTION – SUPPORT FOR GREEN ECONOMIC GROWTH IN DEVELOPING AND EMERGING COUNTRIES

**The Agreement on the Establishment of the Global Green Growth Institute, Adopted on May 12, 2012 and Entry into Force on September 18, 2012, The Republic of Korea Ratified on November 29, 2012 and Entered into Force on December 29, 2012**

Global Green Growth Institution (GGGI) was established to support green economic growth in developing and emerging countries. GGGI headquarter is located in Seoul, Korea. GGGI is open to all UN member countries and consists of general assembly, board of directors, an advisory committee and secretariat. The institutes in Korea, where headquarter is located, and those in other member countries has privileges and immunities.

### GREENHOUSE-GAS EMISSION ACT – ACHIEVE SET REDUCTION OF GREENHOUSE-GAS EMISSION – RESPONSE TO CLIMATE CHANGE – CAP AND TRADE SYSTEM

**Enactment of the Act on the Allocation and Trading of Greenhouse-Gas Emission Permits, Promulgated on May 14, 2012, Act No. 11319**

According to the Framework Act on Low Carbon, Green Growth, the Act on the Allocation and Trading of Greenhouse-Gas Emission Permits (hereinafter "Greenhouse-Gas Emission Act") was enacted to effectively achieve the set reduction of national greenhouse-gas emission. In addition, the purpose of the Act is to actively participate in the worldwide effort to respond to the climate change by assigning greenhouse-gas emission permits to companies that discharges heavy amount of greenhouse-gas and adopting cap and trade system.

Through this Act, the government established basic plan for cap and trade system to set the mid-term and long-term policy goals for 5 years and 10 years. Presidential Committee of Green Growth and Cabinet meeting confirmed this plan. In addition, the Act regulates specific procedure and system such as the establishment of emission allocation committee,

designation of the target companies, allocation, revision and cancellation of emission permit, emission trading, verification and certification of report on greenhouse-gas emission quantity, imposing fine, and support in tax system.

## NEPAL

### RIGHT TO THE ENVIRONMENT – CONSERVATION OF NATURAL RESOURCES – INTRA-GENERATIONAL EQUITY – PRECAUTIONARY APPROACH – CONVENTION ON BIOLOGICAL DIVERSITY

***Advocate Ram Kumar Acharya v. The Prime Minister of Nepal and others* [Supreme Court of Nepal, Special Bench, decided on September 11, 2012, Nepal Law Reporter (Nepal Kanoon Patrika), Vol. 55, No. 1, pp. 47-68, 2013]**

The Bardiya National Park of Nepal occupies an area of 374 sq. miles is the largest and most undisturbed national park in the Terai belt of Nepal. It inhabits 59 species of mammals, 129 species of fish including rare dolphins, 42 species of reptiles, 407 species of birds, and other rare species including endangered flora and fauna. The Government of Nepal, Department of Road initiated a 27-kilometer long road construction project through the Bardiay National Park and also got the Environmental Impact Assessment (EIA) approval from the Ministry of Environment of the Government of Nepal. The writpetitioner, an NGO working in the field of environment protection, brought the public interest litigation (PIL) before the Supreme Court of Nepal, challenging the road construction initiated by the Department of Road. The petitioner argued that the road construction would irreparably damage the rich biological diversity and demanded to order the government to stop the plan and the act of road construction through the Bardiya National Park. Additionally, the petitioner claimed that the act of road construction would violate the obligations of the Nepali government that arise from the international laws, which Nepal is a party to, including the Convention on Biological Diversity (CBD), 1992, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973, Ramsar Convention, 1971, and World Heritage Convention, 1972.

Defending the road construction project, the Department of Road contended that with a full assessment of the need for development and the

responsibility of conservation, the project was selected as one of the most efficient and desirable road construction that connects the hill region with the Terai belt in the area to support the infrastructural need to promote the socio-economic development. As indicated in the EIA, new trees were to be planted along both sides of the road in proportion to 1:25 to further enrich the biodiversity in the area. Further, the Government of Nepal argued that the road construction project was initiated with the prior consent of the local people, who deeply considered that the construction of the road would foster their socio-economic development

The Supreme Court found that the preparation of EIA report itself was faulty and abrogated the EIA. It also ordered to initiate an objective and realistic EIA with a comprehensive analysis of the possible alternatives along with the impact to the environment accompanied by a wider range of public consultation if the road construction through the park is the only alternative for a sustainable development. However, the Supreme Court noted that among the five available alternatives, the government had chosen the project without any convincing reasons to exclude other alternatives. As a party to more than twenty international environmental instruments including different treaties and conventions, the government of Nepal cannot simply disregard its obligations to ensure a balance between the development and conservation. The Supreme Court also emphasized the fact that the government is a public trustee of available natural resources in the country. As the public trustee, government should indubitably bear a responsibility to conserve the natural resources and permit their use without causing any serious damage to the environment. The Court also highlighted the fact that the acts of conservation and the protection of environment should not be employed to retard all the development aspirations as well. The Court noted that the natural resources were indeed for human well-beings. Thus, it should not be understood that no trees could ever be cut, no roads could ever be constructed, no embankment activities could ever be carried out, no bridges should be constructed, or that other similar developmental works be stopped permanently. The Court, however, acknowledging the need for development, instructed that any use of natural resources should be guided by the idea of sustainable development.

# Human rights

## BANGLADESH

### RIGHT TO LIFE – MANDATORY DEATH PENALTY AS INFRINGEMENT OF THE RIGHT AGAINST INHUMAN OR DEGRADING PUNISHMENT – ICCPR – UDHR

***Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh*** **[Writ Petition No. 8283 of 2005. 63 DLR. HCD (2011) 10. Judgment March 02, 2010]**

The convicted detainee [Md. Sukur Ali], allegedly a child (below the age of 16), was proved guilty beyond doubt and was sentenced to death by the trial court under section 6(2) of the Repression of Suppression against Women and Children (Special Provisions) Act, 1995. The sentence was confirmed by the High Court Division and was also upheld by the Appellate Division of the Supreme Court. Subsequently a review petition was lodged with the Appellate Division that also was rejected. In this backdrop, the constitutionality of section 6(2) of the Act of 1995 was challenged by BLAST, a human rights organization, on behalf of Md. Ali while he had been waiting in the death row. Factually, section 6 of the Act of 1995 prescribed the death penalty as the only punishment for the offence of causing death during or after the commission of rape. The petitioner argued that the mandatory death penalty for the offence of murder infringes the right against inhuman or degrading punishment and other cruel treatment under article 35(5) of the Constitution as well as the rights enshrined in article 5 of the UDHR and articles 5 and 6.1 of the ICCPR.

The Court found that article 5 of ICCPR is internalized almost verbatim into the Bangladeshi Constitution (art. 35 (5)) and that the right to life in art 32 of the Constitution, which corresponds to art. 6.1 of ICCPR, also qualifies the extent of the death penalty. The petitioner's counsel submitted that the provisions of ICCPR (articles 6(1), 7, 14(1)(5)) should be read into the provisions of the Constitution of Bangladesh (arts. 32; 35(5)) while considering the legality of the mandatory death penalty, because Bangladesh became party to this treaty. The Attorney-General, however, argued

that international treaties are not enforceable in Bangladesh unless they are specifically incorporated into the domestic law.[38]

The High Court Division cited the ICCPR as a further ground in addition to the Constitution for striking down section 6(2) of the 1995 Act for prescribing the mandatory death penalty for the offence of 'rape and murder'. The Court held: "We find article 5 of the UDHR and article 7 of the ICCPR [as] reproduced almost verbatim into the Constitution['s] . . . article 35(5). . . . [T]he question, [therefore], is whether the death penalty is such that it can be termed as torture or cruel, inhuman or degrading treatment or punishment. We bear in mind also that our Constitution in article 32 qualifies the power of any authority to impose the death penalty".

The Court found that "the mandatory provision of death penalty given in any statute cannot be in conformity with the rights . . . under the Constitution" and it "curtails the court's discretion" to impose upon the accused an alternative sanction. Accordingly, it declared section 6(2) of the Repression of Suppression against Women and Children (Special Provisions) Act 1995 *ultra vires* the Constitution.

### CHILDREN'S RIGHTS– APPLICATION OF THE CHILD RIGHTS CONVENTION– CUSTODY OF CHILDREN– WELFARE OF CHILDREN– ENSURING THE BEST INTEREST OF THE CHILD

***Rayana Rahman v. Bangladesh* [Writ Petition No. 7795 of 2009, 63 DLR (2011) HCD 305. Judgment March 10, 2010]**

This case involved the "abduction" (taking away) of a child by one of the parents. The facts of the case are as follows. After the break-up of marital relation between the respondent, Ahmed Arif Billah, and the petitioner, Rayana Rahman, the latter remarried for the second time. The couple had a male son of three years old. The petitioner, even after marrying another man, used to see and also talk to her son over telephone regularly. One evening, the child's father allegedly took him away beyond the knowledge of the members of the petitioner's family. The petitioner's parents and some other close relatives requested the respondent to return the boy but he refused to comply. The respondent filed a suit in the Family Court

38 The Attorney-General referred to *Hussain Muhammad Ershad v. Bangladesh, (2001) 21 BLD (AD) 69* and *The Government of Bangladesh v. Sheikh Hasina (2008) 28 BLD (AD) 163*.

against the petitioner praying for guardianship of his son and sought an interim injunction restraining the child's mother from interfering with the respondent's custody of the child. The Family Court allowed the above mentioned petition. In such circumstances, the petitioner filed the present constitutional petition challenging the detention of the child by his father and seeking an order to return the child to her.

The Court observed that the welfare of the child will be taken care of by the Family Court, but the only question that it would look into was "whether the [child][39] was illegally removed from the custody of his mother". By citing precedent, the Court held that a writ petition (constitutional petition) may continue challenging the wrongful removal of any child by either parent, even during the pendency of any concerned family court suit.[40]

Imbibed with the concept that, "in matter concerning the custody of the minor children, the paramount consideration is the welfare of the minor and not the legal right of" any particular party to the suit,[41] the Court applied its constitutional jurisdiction to protect the best interest of the child by ordering a shared custodial responsibility.[42]

In deciding this case, the Court applied the Convention on the Rights of the Child 1989 (CRC) which, it noted, is binding for Bangladesh. It observed that, as per article 3(1) of this Convention, "in all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This particular reliance on the CRC formed the basis of the High Court Division's reasoning for its intervention although the custody of children was within the jurisdiction of the Family Court.

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39 The Court used the term detenu (detainee), which I think is not a proper term to describe the child removed from the guardian's custody.

40 *Abdul Jalil v. Sharon Laily Begum Jalil* 50 DLR (AD) 55.

41 *Id.*

42 "Having considered all aspects of the case" and also taking into consideration that "the mother has also a right to take care of, and give company to, the [child]", the Court felt "inclined to direct that the [child] will stay with the father five days a week and two days a week with his mother".

**PROTECTION OF WOMEN – PRIVACY – FREEDOM OF EXPRESSION – GENDER BASED VIOLENCE AS A FORM OF SERIOUS HUMAN RIGHTS VIOLATION – UDHR – ICESCR – UN COMMITTEE ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN.**

***Advocate Md. Salauddin vs. Bangladesh*** **[Writ Petition No. 4495 of 2009; 63 DLR (2011) HCD 80; Judgment April 8, 2010]**

This case involved a public official's religiously arrogant comments against a school headmistress for wearing headscarf. In 2009, an incident of harassment by a superior education officer against a primary school headmistress took place in a remote District, which came into the notice of the Court through a newspaper report brought to the Court's notice by an Advocate of the Supreme Court. The Advocate asked for appropriate punitive actions against the respondent and asked that the Court framed guidelines charting assistance to women working in different government organizations facing harassment. Bangladesh Legal Aid and Services Trust (BLAST) that later became a party to the litigation argued that the conduct of male state official concerned is a form of sexual harassment and a clear instance of gender-based discrimination.

The Court declared that "[i]t is the personal choice of a woman to wear veil or to cover her head. Any . . . attempt to control a woman's movement and expression . . . is clearly a violation of her right to personal liberty. In Bangladesh there has been no uniform practice of veiling or head-covering among women. In the absence of any legal sanction, an attempt to coerce or impose a dress code on women clearly amounts to a form of sexual harassment". Moreover, the Court held, subjecting a woman to harassment for her failure to wear head-scarf is a discriminatory act, which is a violation of the equality clause of the Constitution and is "inconsistent with international standards".

The Court cited a number of international instruments to press upon Bangladesh's obligation to ensure the enjoyment of the right to privacy and freedom of expression. It cited UDHR (arts. 1, 2, 3, & 5), ICCPR (arts. 17 & 19), ICESCR (3 & 7), and General Recommendations No. 19 of the CEDAW Committee. It declared that "[t]hese standards and obligations of the state have been set out in reports of the United Nations Special Rapporteur on Violence against Women . . ." The Court pointed out that as a party to the International Covenant on Civil and Political Rights (ICCPR), Bangladesh

has agreed to bar interference with the right to privacy (article 17) and to protect freedom of expression (article 19). Bangladesh has an obligation to respect and ensure these rights in a non-discriminatory manner, as set forth in article 2 of ICCPR, the Court remarked.

It continued to observe that, "any form of violence against [any] woman" is incompatible with the Universal Declaration of Human Rights[43] and is therefore a violation of the international obligations of Bangladesh. In its view, article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the equal right of men and women to the enjoyment of all rights set forth in that Covenant and many of the substantive rights set out in the Covenant cannot be enjoyed by women if gender-based violence is widespread. The Court further cited the General recommendation No. 19 of the United Nations Committee on the Elimination of Violence against Women (11th session, formulated in 1992), approvingly recognizing that "gender-based violence is a form of discrimination which seriously inhibits a woman's ability to enjoy rights and freedoms on a basis of equality with men" and that State parties should pay regard to this when reviewing their laws and politics. Especially, the Court focused on the General Recommendation assessment that rural women are at special risk of violence because of the persistence of traditional attitudes in many rural communities and it imposes an obligation on states to ensure that services for victims of violence are accessible to rural women.

Finally, the Court adjudged as unconstitutional the particular incident of harassment involved in this case, and issued, *inter alia*, the following directions:

(1) The Ministry of Education is directed to ensure that the women working in different public and private educational institutions are not subjected to harassment by their superiors and others.

(2) The Ministry of Education shall ensure that, women working in all educational institutions are not compelled to wear veil or cover their head with scarf against their will.

43 UDHR, Arts. 1, 2, 3 & 5.

### CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT – ICCPR – CONVENTION AGAINST TORTURE – CUSTOMARY INTERNATIONAL LAW – VIOLENCE AGAINST WOMEN

***Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh*** **[Writ Petition No. 5863 of 2009 with WP Nos. 754 and 4275 of 2010; 63 DLR (2011) HCD 1; Judgment July 8, 2010]**

A "public interest litigation" (PIL) was filed by several human rights organizations seeking court directives for the prevention of *Fatwa*-driven atrocities against women and girl children. The facts of the case are that one Mr. Enamul Mia allegedly used to tease a 16 years old girl on her way to school. One day, he raped her, but the victim, fearing the shame, did not report the offence. The victim was married off to a man in the neighbouring village. After a month of her marriage, the medical test discovered that she was pregnant for seven months. As a result, she was divorced and had to reside in her father's house after an abortion. Following her return, the influential people of the village arranged for an arbitration and compelled the girl to receive 101 lashes as punishment in pursuant to *fatwa* and fined the victim's father taka 1000, failing which the whole family would be forced into isolation while the offender remained surprisingly untouched. In the wake of several such horrific incidents of imposition of extra-judicial punishments in the name of *fatwa* (religious edict) reported by the national media from the mid-2009s, this petition was filed.

The High Court Division of the Supreme Court held that these "incidents" involved "violation of articles 27, 28, and 35 of the Constitution inasmuch as they amount to discrimination against women, who are overwhelmingly the subject of such extra-judicial penalties and who are systematically denied recourse to law or legal protection . . . from cruel or degrading or inhuman treatment or punishment". The kind of offences for which women have been subjected to lashing and beating are for talking to man, pre-marital relations, or for having a child out of wedlock. None of these are offences under law of Bangladesh. As the Court observed, even traditional dispute resolution system (*salish*) has to be carried out in accordance with the law of the country that prohibits the imposition of extra-judicial penalties.

The Court held that, "[i]mposition and execution of extra-judicial penalties including those in the name of execution of *fatwa* is bereft of any

legal pedigree and has no sanction of law". It declared unconstitutional the imposition of extra-judicial punishments in the name of *Fatwa* and directed that such conducts be treated as criminal offences under the relevant penal laws. The Court cited article 7 of the ICCPR and articles 2 & 16 of the Convention against Torture.[44]

The Court reasoned that, the failure of the State to combat such incidents of execution of extra-judicial penalties involves a breach not only of its constitutional obligation but also of an international law obligation to ensure the citizens' right against cruel, inhuman and degrading treatment or punishment.

It further stated that "[t]he failure of the state to take any systematic action to address such incidents of imposition and execution of extra-judicial penalties involves a breach of its obligations under the Constitution and international law to ensure the right to freedom from cruel, inhuman and degrading treatment or punishment". It held that international legal prohibition of torture or other ill-treatment is binding on Bangladesh, and observed as follows:

(a) Bangladesh has an obligation under international law to prevent, prohibit and punish torture and other cruel, inhuman or degrading treatment or punishment. This obligation is contained in a number of international treaties binding on Bangladesh. The universally recognized prohibition of torture or other ill-treatment is also a basic principle of customary international law.

(b) Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides that, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This provision enshrines an absolute proscription, which cannot be limited in any circumstances, and from which no derogation is possible.

(c) Articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) outline that state must prevent acts of torture and other ill-treatment. Article 2(2) of the Convention provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of

44 Both the Conventions are ratified by Bangladesh.

war, internal political instability or any other public emergency, may be invoked as a justification of torture". The UN Committee against Torture has affirmed that the prohibition of such conduct is absolute and non-derogable.

(d) The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) does not explicitly refer to the prohibition of torture and other ill-treatment. Nonetheless, the Committee on the Elimination of Discrimination against Women has held that violence against women "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law".

(e) The Human Rights Committee in its General Comment No. 7 has stressed that the prohibition on torture and other ill-treatment, "must extend to corporal punishment.

The Court remarked that courts of Bangladesh will not enforce these Covenants, treaties and conventions, even if ratified by the State, as they do not become part of *corpus juris* of the State unless incorporated in the municipal legislation. The Court can, however, "look into these conventions and covenants as an aid to [the] interpretation of the provisions of Part III of the Constitution particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution".[45]

The Court declared extra-judicial punishments including those in the name of execution of *fatwa* to be without lawful authority, and issued the following directions:

(i) The persons responsible for imposition of extra-judicial punishments and the abettors shall be held responsible under the Penal Code and other criminal laws.

45 Article 25 of the Constitution states, "amongst others, that the State shall base its international relations on the principles of respect for international law and the principles enunciated in the United Nations Charter".

(ii) The law-enforcing agencies and the local government institutions shall take preventive measures so that extra-judicial punishments including in the name of execution of *fatwa* do not happen in their concerned areas.

(iii) The Ministry of Education is directed to incorporate various types of articles in educational materials in the syllabus at the school, college and university levels and particularly in *madrasas* (religious educational centers), highlighting the supremacy of the Constitution and the rule of law and discouraging imposition of extra-judicial punishment of any form in the name of execution of Islamic Sharia/*fatwa*.

**CHILDREN'S RIGHTS – PROHIBITION OF CORPORAL PUNISHMENT – CHILD PROTECTION – BEST INTEREST OF THE CHILDREN –CHILD RIGHTS CONVENTION – RIGHT AGAINST TORTURE – CRUEL, INHUMAN OR DEGRADING PUNISHMENT OR TREATMENT**

***Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh*** **[Writ Petition No. 5684 of 2010. 63 DLR (2011) HCD 643. Judgment January 13, 2011]**

Towards the beginning of 2010, there was a spate of newspaper reports concerning numerous cases of corporal punishment which was being meted out to students in schools and *madrasha*s (religious educational institutes). The victims were the children representing both boys and girls of various ages, as young as six years up to thirteen or fourteen years old. Subjected to corporal punishment by educational institutions, some children have been victim of horrendous acts of violence administered in the name of discipline. Such an incident of corporal punishment inflicted on a female student of class V, who was mercilessly beaten up for laughing at another girl who had dropped her bag, was brought to the notice of the High Court Division for appropriate action. At this juncture, BLAST and ASK, two human rights organizations, moved the High Court Division by initiating a public interest litigation challenging the constitutionality of corporal punishments such as caning, beating and chaining of children at schools and madrashas.

The Court relied, first, on article 35(5) of the Constitution of Bangladesh which provides that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. The Court then pointed out that Bangladesh ratified the Convention on the Rights of the Child (CRC) 1989 and, therefore, it is incumbent upon all authorities to implement the provisions of the Convention. Importantly, it referred to article 28 of CRC, and reasoned that in the light of the Convention, corporal punishment upon children must be prohibited in all settings including schools, homes and work places. As the Court commented, children who are subjected to corporal punishment or indeed psychological and emotional abuse cannot be expected to develop freely and properly and will not be able to give their best to this society. There are by now numerous countries which have imposed prohibition of corporal punishment both at home and in educational institutions.

The Court observed that, in order to make the prohibition of corporal punishment in the educational establishments effective, the laws relating to disciplinary action against the teachers who impose corporal punishment on students are required to be amended. Finally, it directed the Ministry of Education to ensure inclusion of a provision within the Service Rules dealing with teachers of public and private educational institutions of the country to the effect that the imposition, by a teacher, of corporal punishment upon any student shall be deemed to be an act of misconduct that would subject the wrongdoer to dismissal.

### UDHR – ICCPR - ICESCR - CEDAW – EQUALITY OF MEN AND WOMEN – NON-DISCRIMINATION – TEASING AS SEXUAL VIOLENCE

***Bangladesh National Women Lawyers Association (BNWLA) v. Bangladesh*** **[Writ Petition No. 8769 of 2010, 31 BLD (2011) HCD 324. Judgment January 25 and 26, 2011]**

This case involved the increasing trend of sex-based violence against women, often known as eve-teasing (stalking). Numerous gruesome incidents of eve-teasing/stalking along with the resultant suicides and killings of the female victims and their relatives were being reported in the media, particularly since 2009. In this backdrop, a public-spirited organization popularly known as BNWLA approached the High Court Division seeking some directives/guidelines as the state agencies failed to combat

this particular form of sexual harassment (teasing of girls and women). Moreover, insufficiencies of the existing legal mechanisms to address this social menace compelled the court to direct the government to enact an appropriate legislation, and, pending such legislation, to mandate certain executive measures to prevent sexual harassment including eve-teasing/ stalking in the streets, neighbourhoods, public places, rail and bus stations, and public and private transports.

While issuing certain guidelines and mandating executive measures to prevent sexual harassment including eve-teasing or stalking, the Court drew inspiration from the UDHR 1948 and three major human rights instruments -- ICCPR, ICESCR and CEDAW-- ratified by Bangladesh but not translated into municipal laws. The Court stated that the Universal Declaration of Human Rights (UDHR) 1948 recognises the equal rights of men and women (preamble, articles 1 and 2), while discrimination in the enjoyment of civil, political, economic, social and cultural rights on the basis of sex has been prohibited under the International Covenant on Civil and Political Rights (ICCPR) 1966 (article 2(1)). It continued to say that the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 is the most comprehensive treaty on women's human rights, establishing legally binding obligations to end discrimination against women.

The Court referred to the fact that Bangladesh has acceded to the above instruments, binding itself thereby to implement them. In the Court's words, these international norms "are not just meaningless commitments". "It has now been settled by several decisions [in] this subcontinent that when there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective directives and guidelines to be followed by all concerned until the national legislature enacts laws in this regard". By citing two important decisions of the Supreme Court of Bangladesh, the court reiterated that if the domestic laws are not clear enough or if there is a lack of applicable rule therein, the national courts should draw upon the principles incorporated in the international instruments.[46]

The Court noted that, another bench of the Court in an earlier case, *BNWLA v. Bangladesh (2009) 14 BLC (HCD) 694,* relied on international

46 *Hussain Muhammad Ershad v. Bangladesh* (2001) 21 BLD (AD) 69; Sta*te v. Metropolitan Police Commissioner* (2008) 60 DLR (HCD) 660.

instruments to issue several directives to prevent sexual harassment in educational institutions and workplaces of women. "Keeping intact the definition of sexual harassment given by this court in the above mentioned case of 2009", the present Court in this case added stalking of women and girls within the definition of sexual harassment. For this purpose, it defined the term stalking in clear terms. It observed as follows: "Since this court's earlier decision in the above mentioned case has not dealt with sexual harassment in places apart from educational institutions and work places, we hold that the mischief of sexual harassment as defined by this court and its application are not confined only to educational institutions and work places but extend to all private and public places, railway and bus station[s], public and private transports, streets, shops, markets, cinema halls, parks [and so on]".

With the above observations and findings, the Court in the present case issued few directives and gave clarification of the phenomenon of stalking. The Court thought that the euphemistic expression "eve-teasing" should not be used anymore. The expression "sexual harassment" is the appropriate term to be used by all including the law enforcing agencies, government organizations, establishments and the media for describing the incidents or mischief of so called eve-teasing, it observed. It also held that, the modified definition of sexual harassment that includes stalking shall apply to all places including bus, train, steamer, public and private transport terminals and stops, airports, streets, neighbourhoods, shops, markets, cinema halls, and so on, in addition to the workplaces and educational institutions.

Finally, the Court directed the government to take immediate steps to initiate the framing of new law or to amend the existing law for incorporating specific provisions giving evidential value to the audio-visual statement of victims or witnesses of sexual harassment so that the perpetrators can be punished solely on the basis of such recorded evidence of sexual harassment in case of unwillingness of the victim or other witnesses to give evidence fearing further attack and humiliation and/or torture.

## CHINA

### REFUGEES – DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA – UN HUMAN RIGHTS COUNCIL – ILLEGAL BORDER CROSSERS FROM DPRK SHOULD NOT DEEMED AS REFUGEES

On February 29, 2012, an FM spokesperson made a statement on the plan of the US and the EU to raise the issue of the Democratic People's Republic of Korea (DPRK) "defectors" in the UN Human Rights Council.

> We oppose relevant parties' discussion of the issue concerning illegal border crossers from the DPRK to China in relevant international agencies. These agencies are not the venue for such discussion. We have stated time and again that relevant illegal border crossers are not refugees. They crossed the border illegally out of economic purposes. We oppose the attempt to internationalise and politicise the issue and make it [a] refugee issue. China will stick to its long-standing practice and deal with relevant issue appropriately in accordance with domestic law, international law and humanitarian principles. It serves the common interests of all parties and meets the international common practice. We hope that China's judicial sovereignty will be respected and protected and relevant parties and people will not keep playing up this issue.[47]

On June 26, 2012, an FM spokesperson made a statement on some Myanmarese fleeing to Yunan Province for shelter back to the conflict zones of Myanmar.

> Recently, due to the sporadic exchanges of fire between the Myanmarese Government and some local ethnic armed forces, some Myanmarese inhabitants in the border area entered China temporarily to seek shelter from their relatives and friends for the sake of safety. They are not refugees and go back to Myanmar once the situation calms. Upholding the spirit of humanitarianism, China has been providing living necessities to these people.[48]

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47 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on February 29, 2012*, Ministry of Foreign Affairs of the People's Republic of China, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510 _665401/2511_665403/t910855.shtml.

48 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 26, 2012*, Consulate General of the People's Republic of China in New York, http://www.fmprc.gov.cn/ce/cgny/eng/fyrth/ t946238.htm.

REGULATION – MILITARY MEASURES – UN PEACE KEEPING – UNSC

**Peacekeeping – Regulation on Participation of People's Liberation Army in UN Peacekeeping Operations (Provisional Application)**

On March 22, 2012, the CMC, China's top military organ, adopted the Regulation on Participation of People's Liberation Army in UN Peacekeeping Operations (Provisional Application).

The Regulation is the first special military measure to regulate the participation of the Chinese army in UN peacekeeping operations. It consists of seven chapters and 37 articles, mainly covering the following aspects. Firstly, it defines the scope of peacekeeping operations. Based on the Chinese foreign policy and principles of participation in peacekeeping operations, the Regulation limits the peacekeeping operations in which the Chinese army participates to those within the framework of the UN, stresses the authority of the UNSC and the dominance of the UN and clarifies that peacekeeping operations in which the Chinese army participates are mainly responsible for such tasks as separating parties to a conflict, supervising armistice, engineering, transportation, medical guarantee, as well as rescue and relief.

Secondly, it provides for the organisation and command of peacekeeping operations. The Regulation clearly provides that the participation of Chinese army in peacekeeping operations must be under the uniform command of the CMC, and be planned and guided by the Headquarters, and that every military region and arms and services must be responsible for their corresponding works according to their duties and division of labour among them.

Thirdly, it provides for the dispatch and withdrawal of peacekeeping operations. The Regulation clarifies the procedure for approval of dispatching troops to participate in peacekeeping operations. It also regulates the formation of troops, selection of members, deployment of troops and organisation and implementation of rotation during the period from dispatch to withdrawal.

Fourthly, it provides for education and training of peacekeepers. The Regulation provides for education and training of peacekeepers in terms of ideological and political education, troops training, military professional personnel training, joint training with foreign troops and check and examination. Fifthly, it provides for management and guarantee of

peacekeeping operations. The Regulation clarifies the guarantee duties of every department in peacekeeping operations in accordance with the current provisions relating to logistics and equipment guarantee. Finally, it also clarifies disciplines, weapons, uniforms, promotion and remuneration.[49]

#### TREATIES AND COVENANTS – MINORITY RIGHTS – DISABILITY

### Initial Report under the Convention on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities considered the initial report of China (CRPD/C/CHN/1), including Hong Kong, China (CRPD/C/CHN-HKG/1) and Macao, China (CRPD/C/CHN-MAC/1), at its 77th and 78th meetings, held on 18 and 19 September 2012, and adopted the concluding observations at its 91st meeting, held on 27 September 2012.[50]

## INDONESIA

#### HUMAN RIGHTS – RATIFICATION ON HUMAN RIGHTS TREATIES AND CONVENANTS

### Act No. 6 of 2012 on Ratification of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Act 6/2012)

This Convention regulates the international provisions related to international cooperation and coordination in legal migrant management and illegal migrant prevention. On September 22nd, 2004 in New York, the government of Indonesia has signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families without a reservation. The signature express the commitment and persistence of Indonesian Government to protect, respect, and fulfill the rights of all migrant workers and the members of their families which

49 胡锦涛签署命令 发布施行《中国人民解放军参加联合国维持和平行动条例（试行）》, Xinhua (Mar. 22, 2012), http://news.xinhuanet.com/mil/2012-03/22/c_111691498.htm.

50 Committee on the Rights of Persons with Disabilities, 8th Sess., Sept. 17-28, 2012, *Concluding observations on the initial report of China,* http://www.ohchr.org/Documents/HRBodies/CRPD/8thSession/CRPD-C- CHN-CO-1_en.doc.

hopefully can provide the prosperity for migrant workers and families. As one of the State Party, Indonesia has the commitment to support the establishment of universal convention and the implementation of principles and international standard norms in protecting the rights of all migrant workers and members of their families, globally.[51]

**HUMAN RIGHTS – RATIFICATION – CHILD PROTECTION – CHILDREN'S RIGHTS**

**Act No. 9 of 2012 on Ratification of Optional Protocol to the Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict (Act 9/2012)**

The existence of children within armed conflict can cause a serious risk for long time period. Children can be a torture and murder target as a part of war strategy. Concerning those possibilities, international citizen agreed on taking a step in the need to protect children as stipulated in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict. This Optional Protocol aims to prevent and protect children from the involvement and other possibilities that might happen in the armed conflict. The scope of the Protocol is to prevent the recruitment, training and make advantage of children in the armed conflict in both local and cross-country.[52]

**HUMAN RIGHTS – RATIFICATION – CHILD PROTECTION – CHILDREN'S RIGHTS**

Act No. 10 of 2012 on Ratification of Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Act 10/2012)

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51 Indonesia, *Act No. 6 of 2012 on Ratification of International Convention on the Protection of the Rights of All Migrant Workers and Members of heir Families, State Gazette of the Republic of Indonesia Year 2012 Number 115, Supplement to State Gazette of the Republic of Indonesia Number 5314,* Preamble, para 4.

52 Indonesia, *Act No. 9 of 2012 on Ratification of Optional Protocol to the Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict,* State Gazette *of the Republic of Indonesia Year 2012 Number 148, Supplement to State Gazette of the Republic of Indonesia Number 5329,* Preamble.

The increasing of the sale of children, child prostitution and child pornography in international mobility, is a reasonable ground to strengthen the law enforcement in preventing and countering those crimes. To further enhance the commitment of Indonesia, the government has signed the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The State Parties have duties to 1) forbid the sale of children, child prostitution and child pornography; 2) enforce the law for both person and corporation who offer, provide and accept children for sexual exploitation purpose, organs selling, or forced labor; illegal adoption; offer, get and provide children to do prostitution; distribute, publish, import, export, offer and sell things for child pornography purpose; 3) categorize crimes related to sale of children, child prostitution and pornography as the extradition crimes; 4) establish the international cooperation and mutual legal assistance; 5) take the steps on taking evidence temporarily or permanently of the companies which are used for sale of children, child prostitution and child pornography; 6) take the protective steps for the best interest of child and support all the needs during the criminal proceedings; 7) protect the rights and child interest as a victim.[53]

## JAPAN

### FAMILY LAW – REMARRIAGE AFTER DIVORCE – ICCPR

**Judgment concerning the Prohibition of Remarriage after Divorce, Okayama District Court, 18 October 2012**

Art. 733(1) of the Japanese Civil Code prohibits women from remarrying within six months of a divorce. The aim of this law is to protect the legal status of any unborn child that is presumed to be conceived during the previous marriage, particularly so that the father of the unborn child can be identified. However, this provision might contravene Art. 24 of the Japanese Constitution, which provides for the equality of men and women concerning marriage. ("With regard to choice of spouse, property rights,

53 Indonesia, *Act No. 10 of 2012 on Ratification of Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, State Gazette of the Republic of Indonesia Year 2012 No. 149, Supplement to State Gazette of the Republic of Indonesia No. 5330*, Preamble.

inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.")

The plaintiff, who was divorced on March 28, 2008 and could not remarry until October 7, 2008, sued the government for compensation for the legal delay of her remarriage, based on unreasonable discrimination in case of remarriage between men and women, since only women are subject to the prohibition of remarriage. She also challenged the length of the six month prohibition period for remarriage. Even if it is necessary to protect the legal status of the unborn child, she argued that the prohibition term for remarriage should be the minimum length required to ascertain the father of the child: that the period should be one hundred days from the divorce, since otherwise, the father of child is presumed to be either the previous husband or the present husband based on Art. 722(2), which provides that "A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage." Therefore, she claimed the law should allow for equal treatment for remarriage men and women or at least, provides a minimum length restriction for remarriage for women. Since there is an unreasonable delay due to the legislative body or the Government, she has the right to be compensated based on the State Redress Act.

The court held that in order to meet the criteria based on the State Redress Act (Act No. 125 of 1947), such action should amount to a clear infringement of right by inaction concerning legislation or long-term negligence for no justifiable reason. The court's reasoning referred to the United Nations Human Rights Committee reports in 1998 and 2008 providing that such inaction concerning legislation is not compatible with Art. 2, 3, 26 of ICCPR and the Committee for the Convention on the Elimination of All Forms of Discrimination Against Women found that it is discrimination to have a six month ban on remarriage and recommended that the provision should be abolished in 1998, 2002 and 2008. However, the court stressed that such inaction in this case was not enough to require compensation based on the State Redress Act, particularly because of the nature of the inaction concerning legislation despite the human rights concerns expressed by international organizations.

## ICCPR

### DISABILITY RIGHTS – ICCPR – CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

**Judgments concerning a Disabled Person's Right to Express an Opinion in the Municipal Council, Nagoya High Court, 11 May 2012**

The appellant (plaintiff at the first trial), who was a former member of the Nakatsugawa municipal council and had functional dysphonia due to a resection of his pharynx, sued the government for compensation under the State Redress Act. He claimed he was forced to use a conversion device due to a speech impairment despite his request to have someone to read his statement at the municipal council. He insisted that such an act was against Art. 13 (right to self-determination), Art. 14 (1) (equal rights), Art. 21 (freedom of expression) of the Japanese Constitution, Art. 19(2) (freedom of expression) of the ICCPR, Art. 21 (freedom of expression and opinion, and access to information) of the Convention on the Rights of Persons with Disabilities, and Art. 3 of the Basic Act for Persons with Disabilities (Act No. 84 of May 21, 1970, Amendment: Act No. 90 of 2011).

The court held that to force the use of such a devise did infringe upon the right of the appellant to the freedom of expression and opinion in the municipal council, based on the fact that the appellant could not express his opinion by typing on a keyboard well enough in time to participate in the discussion of the municipal council. His typing skills were inadequate; therefore he sought permission to have someone read his handwriting for him. However, he was not allowed to do so and thus could not express his opinion in the municipal council for years. The court found that this deprived the appellant of his right to expression and opinion. The court did not find infringement of rights of the disabled under the Constitution, the ICCPR, or the Convention on the Rights of Persons with Disabilities. However, the court ruled that the government was responsible for such an infringement of rights and was obliged to pay compensation (three million yen) to the appellant under the State Redress Act because of the conscious intent of the other members of the municipal council who knew that the appellant had difficulty in expressing his opinions orally. Therefore, the court determined that such acts of the members of the municipal council

had met the requirements for the existence of a civil servant's intention or negligence under the State Redress Act.

### ILLEGAL IMMIGRATION – FORCED DEPORTATION – ICCPR – CONVENTION ON THE RIGHTS OF THE CHILD

**Judgment concerning the Forced Deportation a Parent due to Violation of Immigration Status and the Right of a Child to Live with Her Parents, Tokyo District Court, 26 March 2012**

A national of Myanmar who was subject to forced deportation on the grounds that he overstayed his visa, sued the Government being subject to forced deportation. He had been residing and working illegally for around 10 years. His wife is Taiwanese who possessed a resident visa and the couple has a child whose has Taiwanese nationality. He insisted that if he were forced to return to Myanmar, his family would collapse because of the difficulty of resettlement for his wife and child to Myanmar, partially because of the difficulty of international marriages face in Myanmar. He also asked the authorities to consider that the child was raised in Japan and can only speak Japanese. However, the court found that the wife was born in Myanmar and had lived there for over 10 years and she still has friends there and understands Burmese. The child was around a year old at the time of the first notice of deportation and the child had been raised in Japan for a number of years despite the parents' awareness their illegal status in Japan. Therefore, the court attributed responsibility to the parents that the child was raised in Japan and can speak only Japanese.

In conclusion, the court held that the decision concerning the forced deportation was valid based on the discretion of the Minister of Justice and Japan met its obligations under the ICCPR and Convention on the Rights of the Child. In particular, the court held that Art. 17 and 23 of the ICCPR could not have been construed to protect the alien's right of residence in case of forced deportation provided in Art.13 of the ICCPR. Additionally, the court pointed out that it is Art. 9(4) of the Convention on the Rights of the Child that presume that there may be family separation in cases of forced deportations.

In this case, it is notable that despite the wrongfulness of the overstay and working by father and the child's alien nationality, the court determined the validity of the warrant and the decision made by the Minister of

Justice by cautiously referring to and considering the rights of child under the ICCPR and the Convention on the Rights of the Child.

## KOREA

### CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES – REGULATING ADMISSION PROCEDURE AND TREATMENT OF REFUGEES – ENSURE FUNDAMENTAL RIGHTS OF THE REFUGEES – HARMONY WITH INTERNATIONAL LAW

**Enactment of the Refugee Act, Act Promulgated on February 10, 2012, Act No. 11298**

The Republic of Korea acceded to Convention and Protocol Relating to the Status of Refugees (hereinafter the "Refugee Convention") in December 1992. Since then, the immigration office regulated the procedure for admission of refugees. However, compared to other countries, Korea has not admitted many refugees. Consequently, Korea received domestic and international criticism on the speed, clarity, and fairness of the admission process.

Therefore, Korea enacted the Refugee Act for the harmony of International law such as the Refugee Convention and domestic law by 1) aiming to ensure the fundamental rights stated in the Refugee Convention; 2) solving the problems with treating refugees; and 3) specifically regulating the refugee admission procedure and treatment of refugees.

In particular, the Refugee Act clarified meanings of 'refugees,' 'humanitarian aliens,' 'refugee applicants,' and so on to realize the refugee system based on International law. The refugees, humanitarian aliens and refugee applicants are prohibited from compulsory deportation against their will. For example, the refugee applicant can stay in Korea until the decision is made about the refugee admission.

In addition, the Act clarified the matters such as refugee admission procedure and collection of materials for the procedure, fact-finding, cooperation of related administrative agencies, right to counsel, company of a person in fiduciary relationship, translation, confirmation of report on refugee interview, access and copy of the documents, prohibition of publishing personal information. Moreover, the admitted refugees are treated as stated in the Refugee Convention. Accordingly, they receive the same social security as Korean citizens, protection based on National

Basic Living Security Act, education of minor children at primary and secondary school like Korean citizens, and recognition of the education and qualifications received abroad.

#### MATERIALIZE NECESSARY PROCEDURE IN AGREEMENT WITH CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION – ENSURE SPEEDY RETURN OF DETAINED CHILDREN – ESTABLISHMENT OF DOMESTIC JUDICIAL PROCESS

**Enactment of the Act on the Implementation of the Hague Convention on the Civil Aspects of International Child Abduction, Promulgated on December 11, 2012, Act No. 11529**

The Act on the Implementation of the Hague Convention on the Civil Aspects of International Child Abduction was enacted to materialize the procedure necessary to perform agreement to accede to the Convention on the Civil Aspects of International Child Abduction that aims for speedy return of detained (hijacked) children to other country by a person without custody.

The Act Article 4, Section 9 designated the Ministry of Justice in charge of the performance of agreement. In addition, since the Convention does not state the specific judicial process to return the children such as the jurisdiction of the court, the Act Chapter 3 assigned Seoul Family Court an exclusive jurisdiction for the cases concerning returning the children. Subsequently, the Act prepared domestic judicial process necessary to perform the agreement.

## NEPAL

#### RIGHTS OF THE THIRD GENDER, RIGHT TO SEXUALITY – HUMAN RIGHTS – PERSONAL LIBERTY AND FREEDOM – RESPONSIBILITY OF STATE UNDER THE INTERNATIONAL LAW

***Ms. Rajani Shahi v. National Women Commission of Nepal and others*** **[Supreme Court of Nepal, decided on November 5, 2012, Nepal Law Reporter (Nepal Kanoon Patrika), Vol. 55, No. 1, pp. 83-95, 2013]**

Mrs. Rajani Shahi, a married woman, was put into a confinement by two leading non-governmental organizations (NGOs) of Nepal on the ground of claiming her security and rehabilitation. Despite the fact that she was

married to Mr. Pradeed Shahi and had given birth to a daughter, she had expressed her lesbian sexual orientation to her husband and was willing to end the marital relationship with Mr. Shahi. According to her petition before the Supreme Court of Nepal, she used to feel more comfortable having sexual relationship with a girl than with a boy. Lastly, she had filed a case before a court to get divorce with her husband Mr. Shahi. After filing the divorce case, she built a relationship with a lady. But she immediately received threats from Mr. Shahi and asked for security to an NGO working for the rights of the third gender people in Nepal. Mr. Shahi had also used different social pressures and tried to arrest her with the help of police. She had also got an injunctive order from Appellate Court against the police and Mr. Shahi, instructing them not to disturb her personal life including her right to free movement and personal security. While going to the hearing of the divorce case, she was taken into custody by Mr. Shahi with the help of police. With the coordination of the National Women Commission of Nepal, she was put into a secured habitation center under the police control. A few days later, the National Women Commission of Nepal had put her in a different rehabilitation center managed by Maiti Nepal, an NGO. In turn, Maiti Nepal had put her in a confinement, restricting her from going out, meeting her partner, and even talking with any other persons. Thus, her partner Ms. Prem Kumari Nepali had brought a petition of habeas corpus before the Supreme Court of Nepal, asking to release Mrs. Shahi from an illegal confinement and to allow her to enjoy her life as a free person.

The defendant, Maiti Nepal, in response, stated that Mrs. Shahi was not put into any illegal confinement or custody. At the request of the National Women Commission of Nepal, she was instead given protection by Maiti Nepal. He further claimed that none of her psychological, fundamental, or human rights was encroached by Maiti Nepal. The writ petition had no legal ground, as the confinement was not illegal; thus, the petition was brought with malice to defame Maiti Nepal, an NGO working to protect the rights of women in Nepal. The National Women Commission of Nepal had replied to the Supreme Court of Nepal stating that Mrs. Shahi was put into rehabilitation centers with the consent of her father and uncle to provide her security and a shelter for her benefit till the court decided her divorce case.

Recognizing the human rights of an individual guaranteed under different international human rights instruments and domestic laws in-

cluding the Constitution of Nepal, the Supreme Court of Nepal concluded that no authority or organization including NGOs could confine or put a person into custody against his or her free will. Traditionally, a marriage is understood as a relationship between two persons of opposite sex for the purpose of reproduction. However, the sexual orientation of a person cannot be controlled by a marital relationship. Every person has full autonomy to his or her body and is also free to choose his or her partner according his or her sexual orientation. It is the fundamental human rights of every person, such as a married person's right to choose a partner, dissolve his or her marital relationship, and enter into a new relationship of his or her choice. The Supreme Court has also noted that an individual is the owner of his or her own person and body. The right to decide a sexual preference is an exclusive personal matter that is connected to the right of personal autonomy. It is not expedient to the state or society to interfere on such issues of personal autonomy. No one has the right to judge or question adult persons on how they should manage or enjoy their sexual intercourse and whether the intercourse is natural or unnatural. One's sexual orientation should never be the reason for being discriminated against or deprived of exercising one's rights of equal protection of law along with the enjoyment of fundamental human rights and personal freedom.

## PHILIPPINES

### STRENGTHEN AND PROPAGATE FOSTER CARE AND TO PROVIDE FUNDS – RIGHTS OF CHILDREN – FOSTER CARE

**An Act to Strengthen and Propagate Foster Care and to Provide Funds Therefor**

Republic Act No. 10165, known as the "Foster Care Act of 2012," was signed into law by the Philippine President on 11 June 2012. Apart from citing other local laws and the Philippine Constitution in its policy statement, it declares that the State shall guarantee that all the rights of the child found under Article 20 of the UN Convention on the Rights of the Child should be observed (Sec. 2).

The law designates who may be placed in foster care in the Philippines, which include, among others, children who are abandoned, surrendered, neglected, dependent or orphaned; victims of sexual, physical or any

other form of abuse or exploitation; and those with special needs (Sec. 4). Likewise, those who may be foster parents are provided for (Sec. 5). Foster parents are given parental authority over such children (Art. III). The law lays down the procedure in recruitment and development of foster parents (Art. IV), long-term foster placement (Art. V), the adoption of a foster child (Art. VI), and assistance and incentives (Art.VIII).

**ENFORCED OR INVOLUNTARY DISAPPEARANCE – INTERNATIONAL CONVENANT ON CIVIL AND POLITICAL RIGHTS – INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE – AMPARO**

***Edgardo Navia, Ruben Dio, and Andrew Buising v. Virginia Pardico, for and in behalf and in representation of Benhur v. Pardico*** **[G.R. No. 184467. 19 June 2012]**

A vehicle arrived at the house of Lolita M. Lapore. The arrival of the vehicle awakened Lolita's son, Enrique Lapore (Bong), and Benhur Pardico (Ben). When Lolita went out to see what it was, she saw two uniformed guards disembark from the vehicle. One asked Lolita where they could find her son Bong. Before Lolita could answer, the guard saw Bong and told him that he and Ben should go with them to the security office of Asian Land because a complaint was lodged against them for theft of electric wires and lamps.

According to the petitioners, they invited them to their office. Bong and Ben voluntarily went with them. They were interviewed at the security office. The suspects admitted that they took the lamp but clarified that they were only transferring it to a post nearer to the house of Lolita. Since there was no complainant, Navia ordered the release of Bong and Ben. Bong then signed a statement to the effect that the guards released him without inflicting any harm or injury to him. His mother Lolita also signed the logbook. Thereafter, Lolita and Bong left the security office. Ben was left behind as Navia was still talking to him about those who might be involved in the reported loss of electric wires and lamps. After a brief discussion, Navia allowed Ben to leave. Ben also affixed his signature on the logbook. Subsequently, petitioners received an invitation from the police relative to a complaint of Virginia Pardico (Virginia) about her missing husband Ben. Petitioners informed her that they released Ben and that they have no information as to his present whereabouts.

According to the respondents, Bong and Ben were not merely invited since they were unlawfully arrested, shoved into the Asian Land vehicle and brought to the security office for investigation. They were also threatened and physically harmed. Bong admitted that he transferred a lamp to a post near their house. However, because the lamp Bong got was no longer working, he reinstalled it on the post from which he took it. Lolita left with Bong. Ben grabbed Bong and pleaded not to be left alone before leaving. However, they were afraid of Navia, so Lolita and Bong left. Lolita singed the guard's logbook twice without reading it since she had poor eyesight. The following morning, Virginia went to the security office to visit her husband Ben, but only to be told that petitioners had already released him together with Bong the night before.

Virginia filed a Petition for Writ of Amparo before the Regional Trial Court, exasperated with the mysterious disappearance of her husband. The court issued a writ. However, the Supreme Court ruled that the petition for the writ is fatally defective and must be dismissed.

*First,* The Rule on the Writ of Amparo was promulgated to arrest the rampant extralegal killings and enforced disappearances in the country. Article 6 of the International Covenant on Civil and Political Rights recognizes every human being's inherent right to life. Article 9 thereof ordains that everyone has the right to liberty and security. The right to life must be protected by law while the right to liberty and security cannot be impaired except on grounds provided by and in accordance with law. This overarching command against deprivation of life, liberty and security without due process of law is also embodied in the Philippine Constitution.

*Second,* Ben's disappearance does not fall within the ambit of the rule and relevant laws. The rule does not define extralegal killings and enforced disappearances. This omission was intentional to allow it to evolve through time and jurisprudence and through substantive laws as may be promulgated by Congress. The Court has applied the generally accepted principles of international law and adopted the International Convention for the Protection of All Persons from Enforced Disappearance's definition of enforced disappearances, as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person,

which place such a person outside the protection of the law." Congress also enacted a law defining enforced or involuntary disappearances. Reference to enforced disappearances should be construed to mean the enforced or involuntary disappearance of persons contemplated in the law in relation to the rule. There are four elements of enforced disappearance: (1) arrest, detention, abduction or any form of deprivation of liberty; (2) it was carried out by, or with the authorization, support or acquiescence of, the State or a political organization; (3) followed by the State or political organization's refusal to acknowledge or give information on the fate or whereabouts of the person subject of the *amparo* petition; and, (4) the intention for such refusal is to remove subject person from the protection of the law for a prolonged period of time.

Thus, absent in this case is substantial evidence that the disappearance was carried out by, or with the authorization, support or acquiescence of, the State or a political organization, followed by a refusal to acknowledge the same or give information on the fate or whereabouts of said missing persons, with the intention of removing them from the protection of the law for a prolonged period of time.

### INTERNATIONAL HUMAN RIGHTS LAW – RIGHT TO WATER

***Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (IDEALS, Inc.), et al. v. Power Sector Assets and Liabilities Management Corporation (PSALM), et al.*** **[G.R. No. 192088. 9 October 2012]**

PSALM is a government-owned and controlled corporation created by virtue of Republic Act No. 9136, otherwise known as the "Electric Power Industry Reform Act of 2001" (EPIRA). Sometime in August 2005, PSALM commenced the privatization of the 246-megawatt Angat Hydro-Electric Power Plant. The Board of Directors of PSALM approved the bidding procedures for the privatization. After a post-bid evaluation, PSALM's board approved and confirmed the issuance of a Notice of Award to the highest bidder, Korea Water Resources Corporation (K-Water). A petition was filed to enjoin the sale of the power plant to K-Water.

There were many arguments raised in the petition. Related to international law, the petitioners argued that the Philippine Government, along with its agencies and subdivisions, have an obligation under international law, to recognize and protect the legally enforceable human right to wa-

ter. Petitioners cited the Advisory on the "Right to Water in Light of the Privatization of the Angat Hydro-Electric Power Plant" dated November 9, 2009 issued by the Philippines' Commission on Human Rights which urged the Government to revisit and reassess its policy on water resources vis-à-vis its concurrent obligations under international law to provide, and ensure and sustain, among others, "safe, sufficient, affordable and convenient access to drinking water." Once the power plant is privatized, there will be less accessible water supply, particularly for those living in Metro Manila and the Province of Bulacan and nearby areas which are currently benefit from it. Management is better left to a government body and considering the public interest involved. Must the decision to privatize the AHEPP become inevitable, the advisory called for specific and concrete safeguards to ensure the right to water of all, as the domestic use of water is more fundamental than the need for electric power.

Another related argument states that the protection of their right to water and of public interest requires that the bidding process initiated by PSALM be declared null and void for violating such right, as defined by international law and by domestic law establishing the State's obligation to ensure water security.

The Court did not squarely address such arguments of petitioner. Rather, on the question of mootness and standing to sue, it reasoned that the petition was filed as means of enforcing the State's obligation to protect the citizens' "right to water" that is recognized under international law and legally enforceable under the Philippine Constitution, but also to bar a foreign corporation from exploiting Philippine water resources in violation of the Constitution. If the impending sale indeed violates the Constitution, it is the duty of the Court to annul the contract award as well as its implementation. Using other reasons not related to international law, the Court however held that the bidding and the Notice of Award issued in favor of K-Water are valid and legal.

## ENFORCED OR INVOLUNTARY DISAPPEARANCE – DEPRIVATION OF LIBERTY COMMITTED BY STATE OR ITS AGENTS – ADHERENCE TO INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

### An Act Defining and Penalizing Enforced or Involuntary Disappearance

Signed into law by the Philippine President on 21 December 2012, Republic Act No. 10353, or the Anti-Enforced or Involuntary Disappearance Act of

2012, declares adherence to the principles and standards on the absolute condemnation of human rights violations set by the Philippine Constitution and various international instruments such as, but not limited to, the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which the Philippines is a State party (Sec. 2).

Enforced or involuntary disappearance means the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law [Sec. 3(b)]. International law is referred to in defining "order of battle," which is a document made by the military, police or any law enforcement agency of the government, listing the names of persons and organizations that it perceives to be enemies of the State and which it considers as legitimate targets as combatants that it could deal with, through the use of means allowed by domestic and international law [Sec. 3(c)].

An investigation, trial and decision in Philippine court or body for a violation of the law shall be without prejudice to an investigation, trial, decision or any legal or administrative process before any appropriate international court or agency under applicable international human rights and humanitarian law (Sec. 19).

## SRI LANKA

### SUBSTANTIVE RIGHT TO APPEAL FROM A CONVICTION – FUNDAMENTAL HUMAN RIGHTS – UNIVERSAL DECLARATION OF HUMAN RIGHTS – OBLIGATIONS ON THE STATE IMPOSED BY ICCPR

***Gunasekera v. Attorney General* [2012] B.L.R. 215 (Sri Lanka)**

The Accused-Appellant-Petitioner-Appellant (Appellant) was charged before the Magistrate's Court in Marawila, Sri Lanka for committing an offence punishable under section 64(b) of the Sri Lankan Bureau of Foreign Employment Act No. 21 of 1985 and section 386 of the Penal Code. The Appellant pleaded not guilty. After trial, she was convicted for the offence.

After conviction, sentence was postponed and the Appellant preferred an appeal to the Provincial High Court of the North Western Province Court of Chilaw, Sri Lanka.

Subsequently, sentence was imposed on the Appellant for a period of 1 year rigorous imprisonment and a fine of Rs. 15,000.

After this sentence, another appeal was preferred to the same High Court against the same conviction and sentence. Both these appeals were taken up together and were dismissed *in limine*. The first appeal was dismissed on the basis that it was a premature appeal since it was preferred before the pronouncement of the sentence. The second appeal was dismissed on the basis that the Appellant had only canvassed the sentence and not the conviction, and therefore that both appeals had not been lodged in terms of the Criminal Procedure Code.

Leave was granted to the Supreme Court on the question of law of whether the High Court Judge erred in rejecting both petitions of appeal. The Supreme Court answered the question in favour of the Appellant.

The Court was guided by the principle that where "the spirit of the law is vanquished, the law itself is diminished to that extent." The Court adverted to the preamble and section 4 of the High Court of the Provinces (Special Provisions) Act of 1990 and held that the purpose and ambit of the section was to grant an aggrieved party any conviction, sentence or order a substantive right to appeal there from.

The Court held that the right of appeal is a fundamental human right enshrined in domestic and international law, adverting to Article 12 of the Universal Declaration of Human Rights.

It further stated that Sri Lanka had acceded to the International Covenant on Civil and Political Rights (ICCPR) which imposes an obligation on all states to ensure that the rights contained therein are guaranteed to all individuals within the state, in accordance with Article 2 of the ICCPR, and further, that Article 14(5) of the ICCPR guarantees a right to appeal from his/her conviction and sentence. The Court refers to the ICCPR Act enacted by Sri Lanka and holds that Article 4(2) of the ICCPR Act guarantees this right of Appeal.

The Court observed that there was a "deviant procedure" followed in the present case, unlike that which had been practiced over a long period of time. However the Court held that in terms of the International Law there was a right of appeal both after conviction as well as after sentence and

when such cases came as two separate appeals, they should be consolidated and heard and determined as one case and should not be perfunctorily and unthinkingly dismissed.

**HUMAN RIGHTS COUNCIL – RECONCILIATION – ACCOUNTABILITY – LESSONS LEARNT AND RECONCILIATION COMMISSION**

**Resolution on Promoting Reconciliation and Accountability in Sri Lanka, U.N. Doc. A/HRC/Res/19/2 (Apr. 3, 2012)**

The second resolution pertaining to the internal armed conflict in Sri Lanka and its aftermath was adopted by the Human Rights Council (Council) in 2012. 24 states supported this resolution while 15 states voted against it and 8 states abstained. This resolution called on the Sri Lanka government to fully implement the recommendations of the Lessons Learnt and Reconciliation Commission, to develop a comprehensive action plan on such implementation, and to address the violations of international law in relation to the internal armed conflict. It also called on the UN High Commissioner for Human Rights and the special mandate holders to provide advice and technical assistance to Sri Lanka on the implementation of the foregoing.

The UN Office of the High Commissioner for Human Rights was called to submit a report at the next session of the Council on this matter.

**ARBITRARY DETENTION – RIGHT TO AN EFFECTIVE REMEDY – DUE PROCESS – UDHR – ICCPR**

***Pathmanathan Balasingam and Vijiyanthan Seevaratnam v. Sri Lanka*, Working Group on Arbitrary Detention, Opinion No. 26/2012, U.N. Doc. A/HRC/WGAD/2012/26 (2012)**

Mr. Balasingam and Seevaratnam had surrendered to the Sri Lankan Army following an announcement made by the latter. Subsequently, the detention of these two people was ordered under the Prevention of Terrorism Act. It was alleged that the detention of Mr. Balasingam and Seevaratnam was arbitrary in character that there was no oversight or review because courts could not rule on the lawfulness of detention of people who surrendered. The court had never handled such case before. Moreover, there were no procedural safeguards such as the right to legal representation, and there was no stipulated time period within which investigations against a per-

son who surrendered must be concluded. If the person is prosecuted and found guilty, the court may order an undefined extension of the period of rehabilitation as part of the sentence. It was also stated that appeals lodged with the International Committee of the Red Cross and the Human Rights Commission of Sri Lanka had been to no avail.

Sri Lanka government's response to a request for information by the Working Group was that the first individual was indicted in January 2011 and the date for his next court hearing was scheduled in August 2012. The second individual's case had been under consideration by the Attorney General's Department since April 2012, the completion of the investigation.

This was deemed to be an insufficient reply to the Working Group. In the absence of further information, the Working Group based its opinion on the information that had been provided by the source, in accordance to its revised method of work.

The Working Group found that the indefinite detention of people who surrendered in a rehabilitation centre without judicial oversight or review of the lawfulness of their detention constituted an arbitrary detention in and of itself and accordingly, the detention of Mr. Balasingam and Seevaratnam ran contrary to Articles 9, 10, and 11 of the Universal Declaration of Human Rights (UDHR) and Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR).

The Working Group requested Sri Lanka government to take the necessary steps to remedy the situation of Mr. Balasingam and Seevaratnam and to bring it into conformity with the standards and principles set forth in the UDHR and the ICCPR. The Working Group also held that the adequate remedy, under the specific circumstances of these cases, would be to release Mr. Balasingam and Seevaratnam and to accord them compensation in accordance with Article 9, paragraph 5 of the ICCPR.

### RIGHT TO EDUCATION AS A FUNDAMENTAL HUMAN RIGHT – UNIVERSAL DECLARATION OF HUMAN RIGHTS – DIRECTIVE PRINCIPLES OF STATE POLICY

***Visal Bhashitha Kavirathne v.W.M.N.J. Pushpakumara* [2012] S.C. (FR) Application No. 29/2012 (Sri Lanka)**

This application was filed by 16 students who sat for the General Certificate of Education Examination (Advanced Level Examination) held in August 2011 and the Ceylon Teachers Union. The petitioners complained

that the application of an erroneous and unjustifiable common formula to calculate the Z-Scores of the candidates of both New and Old Syllabi of the Advanced Level Examination in 2011, which resulted in the failure to rank the most qualified candidates for admission to Universities, was arbitrary, unreasonable, irrational, unjustifiable and is in violation of the petitioners' fundamental rights guaranteed under Article 12 (1) of the Constitution.

The Court does not limit its analysis to the right to equality but also refers to the formulation of the right to education as illustrated in Article 26(1) of the Universal Declaration of Human Rights (UDHR), which refers to the general availability of higher education "equally accessible to all on the basis of merit."

Further, the Court refers to Article 27(2)(h) of the Constitution which refers to the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels, which is a Directive principle of State Policy.

The Court observed that Article 12(1) of the Constitution, which deals with the right to equality, had been applied by the Supreme Court to uphold the right to education in many decisions concerning admission of students to government schools and universities. The Court stated that "although there is no specific provision dealing with the right to education on our Constitution as such in the UDHR, the said right has been accepted and acknowledged by our Courts through the provisions embodied in Article 12(1) of the Constitution." The Court observed that in doing so, it had accepted the right to education as a fundamental human right and had also acknowledged the value of education.

### ARBITRARY DETENTION – RIGHT TO AN EFFECTIVE REMEDY – DUE PROCESS – UDHR – ICCPR – HUMAN RIGHTS COUNCIL RESOLUTION 7/7

### *Gunasundaram Jayasundaram v. Sri Lanka,* Working Group on Arbitrary Detention, Opinion No. 38/2012, U.N. Doc. A/HRC/WGAD/2012/38(2012)

Gunasundaram Jayasundaram was arrested on September 4, 2007 in Colombo, Sri Lanka under suspicion of supporting the Liberation Tigers of Tamil Eelam (LTTE). He was allegedly arrested without a warrant by orders of the military authorities under the Emergency Regulations, and the accusations against him were based solely on statements of another person.

He was arrested and held in detention without prompt access to a lawyer, without charges being brought against him, and was not brought before an independent judicial authority. At the time the opinion was written, he had been detained for almost five years without a trial and efforts to seek judicial remedies, including a *habeas corpus* application filed on his behalf, and a fundamental right application before the Supreme Court had been met with repeated delays. Also, Mr. Jayasundaram was in ill-health condition, and allegedly, was not receiving appropriate medical attention.

The Government's response to a request for information by the Working Group was that there was evidence of Mr. Jayasundaram involvement in LTTE procurement activities and that they were awaiting a response from the Attorney-General's Department of Singapore, as he was a permanent resident of that country. Further, it stated that the *habeas corpus* application had been withdrawn by the counsel appearing for the applicant, and that the fundamental right application before the Supreme Court would be fixed for hearing after objections and counter-objections are filed.

In the light of the information made available to it, the Working Group considered that the deprivation of liberty of Mr. Jayasundaram was arbitrary, contravening Articles 9 and 10 of the UDHR and Articles 9, 14, and 26 of the ICCPR.

The Working Group requested the Government of Sri Lanka to remedy the situation of Mr. Jayasundaram and to bring it into conformity with its international human rights obligations under the ICCPR. The Working Group asserted that the appropriate remedy for the present case would be the immediate release of Mr. Jayasundaram and his enforceable right to compensation under Article 9, paragraph 5, of the ICCPR. The Working Group also requested the Government to allow Mr. Jayasundaram access to all appropriate medical facilities. Finally, the Working Group reminded the Government that, according to Human Rights Council Resolution 7/7, national laws and measures aimed at combating terrorism shall comply with all obligations under international human rights law.

## UNIVERSAL PERIODIC REVIEW – NATIONAL ACTION PLAN FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS – LESSONS LEARNT AND RECONCILIATION COMMISSION – RECOMMENDATIONS

**Report of the Working Group on the Universal Periodic Review: Sri Lanka, U.N. Doc. A/HRC/22/16 (Dec. 18 2012)**

Sri Lanka underwent a review before the UN Human Rights Council, through a troika consisting of Benin, India, and Spain. The state relied on its National Action Plan for the Promotion and Protection of Human Rights, the task force established for the implementation of the recommendations made by the Lessons Learnt and Reconciliation Commission (LLRC), its resettlement programmes, the Court of Inquiry appointed by the Army to investigate into allegations regarding, among other things, civilian casualties, different forms of assistance provided to those affected by the conflict, the new language policy, and its development projects in conflict-affected areas claiming that Sri Lanka was respecting its human rights obligations.

During the interactive dialogue before the Council, 98 delegations made statements and numerous recommendations. Out of the recommendations made, Sri Lanka was in support of 110 and not in support of 94. The recommendations supported by Sri Lanka were ratification of the Convention on the Rights of Persons with Disabilities, implementation of the recommendations of the LLRC, and the strengthening of the independent function of the National Human Rights Commission. The recommendations not supported by Sri Lanka were ratification of the Statute of the International Criminal Court, the International Convention for the Protection of All Persons from Enforced Disappearance, and the Optional Protocol to the Convention against Torture, abolishing the death penalty and obtaining the assistance of the international community in the implementation of the recommendations of the LLRC.

## CITIZEN'S PETITION OF CONTINUOUS TORTURE AND THREAT BY POLICE – HUMAN RIGHTS VIOLATION – STATE'S FAILURE TO RESPOND TO PETITION – VIOLATION OF HUMAN RIGHTS OBLIGATIONS IMPOSED BY ICCPR

***Annakkarage Suranjini Sadamali Pathmini Peiris v. Sri Lanka*, Communication No. 1862/2009, U.N. Doc. CCPR/C/103/D/1862/2009 (2012)**

This individual petition was submitted by Annakkarage Suranjini Sadamali Pathmini Peiris (Author) on her behalf as well as on behalf of her deceased husband and her two minor children. The Author claimed, among other things, that they were subject to torture and ill-treatment, arbitrary deprivation of the right to life, and the right to the family. The Human Rights Committee (Committee) recognised that the right to life, right to be free from torture, right to liberty and security, right to be free from arbitrary interference of privacy and family, and the freedom of association of the Author and her family had been violated by the state.

The violations occurred subsequent to the discovery by the Author and her husband that a vehicle purchased by them in 2003 from a police officer was in fact stolen. The Author and her family complained of this which resulted in a disciplinary inquiry being conducted against the police officer. Since then, different police officers threatened and harassed the Author and her family in their interactions with the police and the severity of these actions escalated with each complaint the Author and her family made against this conduct of the police. Even though the police officer who had sold the stolen vehicle was indicted in 2005 and died in that same year, the harassment by the police continued. In 2008, the Author's husband was shot to death by an unidentified person. Since then, the Author and her family had been compelled to live in hiding. The Author's complaints to the police, the Human Rights Commission, the Bribery Commission was proved to be futile.

The state did not respond to this petition and the Committee noted the failure of the state to respect its obligation to examine in good faith all allegations brought against them under the Optional Protocol.

Having declared the petition to be admissible, the Committee recognised that the state was in violation of its obligations under the International Covenant on Civil and Political Rights towards the Author and her family. The Committee recommended, among other things, that an effective rem-

edy be made available to the Author and her children that they be provided with adequate reparation which would include an apology to the family.

## Humanitarian Law

### INDONESIA

#### HUMANITARIAN LAW – NUCLEAR WEAPONS – RATIFICATION OF COMPREHENSIVE NUCLEAR TEST BAN TREATY

**Act No. 1 of 2012 on Ratification of Comprehensive Nuclear Test-Ban Treaty (Act 1/2012)**

For Indonesia, the ratification of this treaty through Act 1/2012 will strengthen the standing and credentials Indonesia as a country that is always supportive and committed to non - proliferation and nuclear disarmament and strengthen the position of Indonesia to participate urged other countries to accelerate the ratification of the treaty. Ratification by the Government of Indonesia at this time is expected to be demonstrative, showing a strong commitment to the Government of Indonesia to pursue nuclear disarmament, as well as to provide a strong pressure for other countries as listed in Annex 2 to immediately ratify the treaty. At the regional level, the ratification of the CTBT may contribute to the maintenance of regional security and stability will be the impetus for efforts to build mutual trust among countries in the region.[54] Ratification of the treaty is also an opportunity for Indonesia to take advantage of geophysical technology, nuclear, and informatics in the context of development and research, among others in developing early warning mechanisms (early warning system) against the possibility of a catastrophic earthquake and tsunami.

### NEPAL

#### CONTROL OF ARMS, EXPLOSIVES, AND LANDMINES – ARMED CONFLICT AND THE SECURITY OF CIVILIANS – INTERNATIONAL HUMANITARIAN LAW – BILLS OF RIGHTS – RESPONSIBILITY OF

54 Indonesia, *Act No. 1 of 2012 on* Ratification of Comprehensive Nuclear Test-Ban Treaty, *State Gazette of Republic of Indonesia Year 2012 No. 1, Supplement to State Gazette of Republic of Indonesia No. 5269,* Preamble.

STATE UNDER THE INTERNATIONAL LAW

***Advocate Tulshi Simhkada v. The Constituent Assembly Parliament and others* [Supreme Court of Nepal, decided on September 5, 2012, Nepal Law Reporter (Nepal Kanoon Patrika), Vol. 55, No. 1, pp. 69-74, 2013]**

During the ten year long Maoist insurgency in Nepal, the Maoist rebel group had illegally imported a huge amount of arms, ammunition, explosives, and installed landmines indiscriminately across the country. In the post-2006 political scenario of Nepal, with the initiation of peace process in the country, the UN Mission to Nepal had initially managed the arms of the Maoist insurgents. With the withdrawal of the UN Mission, the task of arms management is now carried out by the Government of Nepal itself. Nevertheless, the demining process has faced numerous challenges. Moreover, different political groups have appeared in Nepal equipped with small arms even in the post-2006 period. Ever since these political groups increased the illegal use of arms throughout the country which escalated the problem of insecurity and rapid growth of violence and crimes, not only do they have easy access to small arms, but also criminals and individual do. The problem of insecurity in Nepal has not been ameliorated even in the post-conflict period. Instead, criminal activities have grown rapidly. Because of this increase in crimes, the writ petitioner had asked the Supreme Court of Nepal to issue an order to the government of Nepal to take necessary measures to control the proliferation and use of arms, explosives, landmines, and other weapons in the country. The petitioner had also contended that it was the responsibility of the government to ensure the security of civilians and implement the international human rights and humanitarian instruments including the Geneva Conventions, 1948 to which Nepal is a party of.

In its defense, the Government of Nepal had stated that the government was always determined to provide security to the civilians and protect their lives, liberties, and properties by creating conducive conditions for the successful implementation of the rule of law in the country. However, the government had also contended that the goal of a peaceful society could not be achieved by the efforts of a government without the cooperation of its citizens. The government had also argued that the existing domestic laws of Nepal were sufficient to implement the international commitments of Nepal including those arise from the international humanitarian laws.

If there was any need to enact a new law, it had to be realized by the parliament since law-making is the exclusive authority and jurisdiction of the legislative body. Respecting the separation of powers between the state organs, it would not be proper for other institutions or organs of the state to dictate the legislative body on the issue of what law it should enact and what law it should not enact.

Vindicating the claim of the petitioner, the Supreme Court of Nepal has stated that it was the responsibility of the government to give effect to the International Bills of Human Rights and the international humanitarian laws through the effective implementation of domestic laws in the country. The court noted that guaranteeing the security of people living inside its territorial jurisdiction should be the primary duty of a government. On top of that, a republican democratic welfare state cannot be indifferent to the primary issue of the civilian security. As a member of international community and a party to a number of international human rights and humanitarian laws, the state should continuously be determined to fulfill its international obligations. Despite the fact that Nepal has suffered from the long insurgency and conflict, which has somehow depleted its resources, nevertheless, under no condition should a state remain unresponsive to fulfilling its obligations in protecting the civilians and guaranteeing the security of people living in its territory. However, on the ground of separation of powers of the state organs, the Supreme Court declined to issue any order against the legislative body or instruct it to enact necessary laws to give effect to the international humanitarian laws.

## International Economic Law

### INDONESIA

#### TRADE – ECONOMIC COOPERATION

**Joint Statement between the Minister for Foreign Affairs of the Republic of Indonesia and the Minister for Foreign Affairs of the Democratic Republic of Timor-Leste**

Referring to the Arrangement between the Government of Indonesia and the Government of Timor-Leste on the Traditional Border Crossings and Regulated Markets, which was signed in Jakarta on 11 June 2003, and to

the Joint Statement by the Minister of Foreign Affairs of Indonesia and Minister of Foreign Affairs of Timor-Leste officiating the Border Crossing Pass, which was signed in Dili, East Timor on 28 July 2010, the Government of Indonesia and the Government of Timor-Leste finally signed a Joint Statement in Dili, East Timor on 19 May 2012 to launch the application of the Border-Crossing Pass in the crossing point of Napan-Boborneto to facilitate nationals of both countries who are domiciled in their respective border area, for the traditional and customary purposes or trade at a regulated market.

## INTERNATIONAL AGREEMENT – ECONOMIC COOPERATION – TRADE

### Agreement between the Republic of Indonesia and the Portuguese Republic on Economic Cooperation

The Agreement was concluded and signed on 22 May 2012 in Jakarta, Indonesia. It comes into force 30 days after the date of the receipt of last notification on the fulfillment of internal requirements for the entry into force of the Agreement. The Agreement accommodates the desire of Indonesian Government and Portuguese Government to develop advantageous economic cooperation between the two countries. It aims to enhance the existing economic relations between the two countries in three areas namely trade, industry, energy and other mutually agreed upon areas. One of the cooperation mechanisms as set out in the Article 3 of the Agreement is encouraging promotion of contacts between public institutions of both countries, including the exchange of experts under terms to be agreed upon between the concerned bodies. The Agreement put an emphasis on the development of green industry in the two countries. Particularly in the energy sector, the Agreement highlights that the parties agree to develop new renewable forms of energy, including sustainable bio fuels and biomass, geothermal, hydro power, solar, wind and ocean energy. Ensuring the implementation of the Agreement, the Parties shall establish a Joint Committee, consisted of representatives from both States, who will be responsible for supervising and coordinating the economic cooperation between the two States.

ECONOMIC COOPERATION – RATIFICATION – TRADE AGREEMENT

**Presidential Regulation No. 61 of 2012 on the Ratification of Second Protocol to Amend the Agreement on Trade in Goods Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea**

Presidential Regulation No. 61 of 2012 was enacted in Jakarta, on 7 June 2012. It ratifies the Second Protocol to Amend the Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of ASEAN Member States and Korea. The agreement itself was signed on 17 November 2011 in Bali, Indonesia.

RATIFICATION – BILATERAL TRADE AGREEMENT

**Presidential Regulation No. 63 of 2012 on the Ratification of Trade Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand**

Presidential Regulation No. 63 of 2012 was enacted in Jakarta, on 13 June 2012. It ratifies the Trade Agreement between the Government of Indonesia and the Government of Thailand. The agreement itself was signed on 16 November 2011 in Bali, Indonesia. In essence, the agreement aims to promote and strengthen trade between two States for mutual benefit.

INTERNATIONAL AGREEMENT – ECONOMIC AND TECHNICAL COOPERATION

**Agreement between the Government of the Republic of Indonesia and the Government of Georgia on Economic and Technical Cooperation**

The Agreement was signed on 29 June 2012, in Jakarta, Indonesia. It enters into force on the date of the receipt of last notification on the fulfillment of internal requirements for the entry into force of the Agreement. In essence, the Agreement aims to encourage economic and technical cooperation between Indonesia and Georgia. However, the detailed provisions with regards to the forms and methods as well as to the conditions of the cooperation in the specific agreed areas will be laid down in separate

implementing agreement. One thing to be highlighted is that the parties have agreed to establish a Joint Commission to examine the implementation of the Agreement, to talk about the issues that might occur from the application of the Agreement, and to provide all necessary recommendation to achieve its purposes.

RATIFICATION – ECONOMIC COOPERATION – TRADE AGREEMENT – EXPANSION OF BILATERAL TRADE – FREE TRADE AGREEMENT

**Presidential Regulation No. 98 of 2012 on the Ratification of Preferential Trade Agreement between the Government of the Republic of Indonesia and the Government of the Islamic Republic of Pakistan**

Presidential Regulation No. 98 of 2012 was enacted on 17 November 2012. It ratifies the preferential trade agreement between the Government of Indonesia and the Government of Pakistan which was concluded in Jakarta, on 3 February 2012. In essence, the Agreement aims to eliminate obstacles to trade in order to expand bilateral trade between Indonesia and Pakistan which leads to Free Trade Agreement (FTA) between them. In accordance with the principle of the Most Favored Nation (MFN), all products as set out in Annex I and Annex II of the Agreement enjoy reduction of price and even elimination of price where relevant. Furthermore, Article 5 of the Agreement states that the provision of GATT 1994 and WTO Agreements shall be applicable to all products covered in the Agreement.

TRADE – ECONOMIC COOPERATION

**Protocol to Incorporate Technical Barriers to Trade and Sanitary and Phytosanitary Measures into the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China**

This Protocol has been signed in Phnom Penh, Cambodia on November 19, 2012, ratified through Presidential Regulation No. 28 of 2014, State Gazette Year 2014 Number 79 that has been enacted on April 21, 2014. This Protocol entered into force on January 1, 2013. The objectives of this Protocol are to facilitate and promote trade in goods among the Parties by ensuring technical regulations, standards and conformity assessment procedures do not create unnecessary barriers to trade; to strengthen cooperation,

including information exchange in relation to the preparation, adoption and application of standards, technical regulations and conformity assessment procedures; and to promote mutual understanding of each Party.

## International Labour Organisation (ILO)

### PHILIPPINES

#### INTERNATIONAL LABOR ORGANIZATION (ILO) – ILO CONVENTION 189 (CONVENTION CONCERNING DECENT WORK FOR DOMESTIC WORKERS)

**Philippine Senate Resolution No. 115, 6 August 2012**

ILO Convention 189 was adopted by the General Conference of the ILO on 16 June 2011 in Geneva. The convention applies to all domestic workers, sets standards for decent work for them, and guarantees minimum labor protections to them at part with workers in the formal economy.

The convention provides for the basic rights of domestic workers which need to be recognized and respected through the adoption of laws, policies and measures that would enable them to exercise such rights. Social dialogue is promoted as a means of designing and effectively implementing policies and measures that would protect the rights of domestic workers. The Philippine President ratified the convention on 18 May 2012.

The resolution refers to the vital contribution of domestic workers to the functioning of households, the labor market, and the economy. It states that there are 1.93 million domestic workers in the country, and in 2010 alone, more than 100,000 Filipino domestic workers are deployed to various countries. Domestic workers are particularly vulnerable to discrimination and other human rights abuses.

#### INTERNATIONAL LABOR ORGANIZATION (ILO) – MARITIME LABOR CONVENTION

**Philippine Senate Resolution No. 118, 13 August 2012**

In 2006, the Maritime Labor Convention was adopted by the ILO General Conference in Geneva. In concurring with the executive's ratification of the

convention on 28 May 2012, the Senate resolution refers to the Philippines as a primary source of seafarers in the world, accounting for an estimated 30% of seafarers in the global shipping fleet. Aside from seafarers deployed on foreign ships, some 40,000 Filipino seafarers work on board domestic fleets. The seafaring industry contributes to national development, but Filipino seafarers are exposed to a wide range of issues. There is a need to re-share regulations and vigorously enforce policies and programs to safeguard the seafaring industry and Filipino seafarers.

The resolution hails the convention as the seafarers' bill of rights which puts in a single treaty existing maritime labor instruments and brings those up to date to address current realities and conditions. It consolidates 37 maritime conventions and 31 ILO recommendations to provide unified regulations and standards to protect the welfare and promote the rights of seafarers. The convention is organized into three main parts, namely, the Articles and Regulations (core rights and principles and basic obligations of Member States), and the Code (details for the implementation of the Regulations, including mandatory standards and non-mandatory guidelines).

## International Law Commission

### INDIA

#### IMMUNITY – PROVISIONAL APPLICATION OF TREATIES – CUSTOMARY INTERNATIONAL LAW – OBLIGATION TO EXTRADITE OR PROSECUTE – MOST-FAVORED-NATION CLAUSE – MFN – GATT

**Statement by India on Agenda Item 79: "Report of the International Law Commission on the Work of Its Sixty-Fourth Session (Part-Two)" at the Sixth Committee of the 67th Session of the United Nations General Assembly on November 6, 2012**[55]

According to India, this topic held great significance as it was directly related to the performance abroad of the officials of a State. The topic was complex and politically sensitive. India agreed with the Special Rapporteur that the substantive issues relating to this topic were cross-cutting and interrelated, but, at the same time, each and every issue needed to be looked

55 *See* Ministry of External Affair, http://meaindia.nic.in.

into carefully and in a through manner. Consideration of this topic, India noted, required a balanced approach taking into account the existing law and practice on the related issues. In this regard, India suggested that the in-depth examination of the judgment of the International Court of Justice of February 3, 2012 in the *Jurisdictional immunities of the States'* case would be desirable, which inter-alia identified state practice in respect of immunities before national jurisdictions.

India pointed out that the issue of relationship between the *immunity ratione materiae* and *immunity rationae personae* would also need to be examined by taking into account the State practice and the ICJ judgment in the case, *certain questions of mutual assistance in criminal matters*. Concerning the applicability of immunity *ratione personae* beyond troika, India was in favor of identifying a clear criterion in establishing such practice by taking into consideration the judgment of the ICJ in the *Arrest Warrant case*.

India considered that the established legal order and certain aspects of immunity dealt under the existing international instruments should not be disturbed.

As regards the new topic of "Provisional application of treaties," India supported the view that aspects relating to the formation and identification of customary international law did not form part of the scope of this topic. India was in favor of preserving the regime established under Article 25 of the 1969 Vienna Convention on Law of Treaties and not creating new conditions and circumstances for the provisional application of treaties. On the question of the final outcome of the Commission's work, India agreed with those members of the Commission who thought it was pre-mature to take any decision as to the form of the outcome and that the topic did not necessitate the elaboration of draft articles.

On the topic "Formation and evidence of customary international law," India pointed out that Custom had been recognized as a source of international law, and this was also reflected in the Statute of the International Court of Justice annexed to the UN Charter. Customary principles of international law, India further noted, developed out of behavior of the States in their international relations through a unique process and were not always easily defined. India felt that it might be, therefore, difficult to advance new rules on the formation and evidence of customary international law. India was of the view that the work of the Commission should

be mainly focused on ways and methods concerning the identification of the rules of customary international law and that how the evidence of those rules could be established.

India agreed with the Special Rapporteur that elaboration of conclusions with commentaries or guidelines on this topic would be of high practical value for the judges, scholars, and practitioners who face the questions of customary international law both at the international and national levels.

India viewed the work on the codification and clarification of issues concerning the topic of "the obligation to extradite or prosecute" was of great importance given the fact that the obligation was based on the rule that a criminal should not go scot free and should be brought before the justice. The progress on the topic was slow for which the reason in the report appeared to be the absence of basic research on whether or not the obligation had obtained the customary law status. In this regard, India agreed with those members of the Commission who were of the view that the absence of the customary nature of the obligation should not pose insurmountable difficulties in the further consideration of the topic.

India considered that the obligation to extradite or prosecute and the concept of universal jurisdiction were not interrelated in the sense that one was dependent on the other and so agreed with those members of the Commission who had opined to delink the topic from the universal jurisdiction.

India agreed with the observation of the Working Group on this topic that the in-depth analysis would be required of the ICJ judgment of July 20, 2012 in the case *Questions relating to the obligation to prosecute or extradite* in order to assess its implication for this topic.

As regards the topic of Most-Favored-Nation clause, India noted that the state practice in relation to MFN provision had been, to a large extent, superseded by specific multilateral, bilateral, and regional arrangements. The GATT and resort to the dispute settlement under the investment agreements had resulted in the interpretation of MFN provision in the investment context.

India agreed with the Commission's observation that the reason of the peculiarities of the application of MFN clause in the mixed arbitral decisions was the different nature of the parties to the proceedings—the claimant being a private person and the respondent being a State—and that

the tribunal acted as a functional substitute for an otherwise competent domestic court of the home State.

## International Organisations

### INDONESIA

#### ECONOMIC COOPERATION AND DEVELOPMENT – FRAMEWORK AGREEMENT WITH OECD

**Framework of Cooperation Agreement between the Government of the Republic of Indonesia and the Organization for Economic Co-Operation and Development**

This Agreement has been signed in Jakarta, September 27th, 2012. It entered into force on the signatory date and has been enacted for 5 (five) years. As stipulated on the Agreement, Organization for Economic Co-Operation and Development (OECD) and Indonesia will cooperate in these fields, namely forum dialogue related to the global issues; monitoring, evaluation and standardization in promoting government reformation and transparency; and the development of public service to support the establishment of good management in entrepreneurship.

## Jurisdiction

### CHINA

#### FOREIGN RELATED CRIMES – JURISDICTION – CRIMINAL – CHINESE CRIMINAL CODE

**Supreme People's Court Interpretation of the Second Amendment to the 1979 Criminal Procedural Code**

On November 5, 2012 the Supreme People's Court adopted the Interpretation in order to correctly understand and apply the second amendment to

the 1979 Criminal Procedural Code.[56] This Interpretation came into force on January 1, 2013.

Articles 4–10 of the Interpretation provide the detailed rules on jurisdiction of the Chinese courts in foreign-related crimes. Article 4 provides that the jurisdiction over any crime committed in the Chinese-registered ships outside the Chinese territory shall be exercised by the court of the Chinese port where the ship anchored for the first time after the crime. Article 5 provides that the jurisdiction over any crime committed in the Chinese-registered aircraft outside the Chinese territory shall be exercised by the court of the place where the aircraft landed for the first time after the crime.

Article 6 provides that the jurisdiction over the crimes committed on international trains shall be determined according to agreements which were concluded by China and other relevant countries; in case that there is no such an agreement, the jurisdiction shall be exercised by the court of the place where the train arrives in China for the first time after the crime, or the court of the place which is the destination of the train.

Article 7 provides that the jurisdiction over the crimes committed by Chinese citizens inside Chinese embassies or consulates abroad shall be exercised by the court of the place where his or her employer is located or the court of the place where his or her household is registered.

Article 8 provides that the jurisdiction over any crime committed by Chinese citizens outside the Chinese territory shall be exercised by the court of the place where he or she enters China or the court of the place where he or she resided before leaving China; if the victim is also a Chinese citizen, jurisdiction may be also exercised by the court of the place where the victim resided before leaving China.

Article 9 provides that jurisdiction over any crime committed by an alien against the Chinese State or a Chinese citizen outside the Chinese territory shall be exercised by the court of the place where the alien enters

56 The Criminal Procedural Code of the People's Republic of China was adopted at the Second Session of the Fifth National People's Congress (NPC) on July 1, 1979. It was amended for the first time at the Fourth Session of the Eighth NPC on Mar. 17, 1996. The Second Amendment was adopted at the Fifth Session of the Eleventh NPC on Mar. 14, 2012 and came into force on Jan. 1, 2013.

China or resides in China, or the court of the place where the Chinese victim resided in China before leaving China, provided that the alien shall be punished according to the Chinese Criminal Code.

Article 10 provides that jurisdiction over crimes stipulated in international treaties which were ratified or acceded to by China, within the scope of the obligations which have been accepted by China, shall be exercised by the court of the place where the defendant was captured.[57]

## INDIA

### JURISDICTION – UNIVERSAL JURISDICTION – TERRITORIAL – NATIONALITY – THE NATURE OF OFFENCES – INTERNATIONAL CRIMES

**Statement by India on Agenda Item 84 "The Scope and Application of Universal Jurisdiction" at the Sixth Committee of the 67th Session of the United Nations General Assembly on October 17, 2012[58]**

India held the firm view that those who commit crimes must be brought to justice and punished. A criminal, India further noted, should not go scot free because of procedural technicalities including the lack of jurisdiction.

India also pointed out that assuming and exercising jurisdiction was, however, a distinct subject in itself. According to India, the term "jurisdiction," in legal parlance, referred to two aspects: first, the rule-making and second, rule-enforcing. The widely recognized theories of jurisdiction included, India pointed out, Territorial, which was based on the place where the offence was committed; Nationality, which was based on the nationality of the accused or the nationality of the victim; and Protective, which was based on the national interests affected.

These jurisdictional theories, India observed, required a connection between the state asserting jurisdiction and the offence, including the

57 http://www.court.gov.cn/qwfb/sfjs/201212/t20121228_181551.htm.

58 *See* Ministry of External Affairs, http://meaindia.nic.in.

nationality of the offender or of the victim, or the place of the commission of offence.

India stated that under the present agenda item, we were, however, deliberating upon a new and different type of jurisdictional theory, namely the universality theory, which lacked proper legal backing at both the national and international levels.

According to India, a State invoking the universal jurisdiction claimed to exercise jurisdiction over any offender, irrespective of the question of nationality or the place of commission of the offence, or of any link between that State and the offender.

It assumed that each state had an interest in exercising jurisdiction to prosecute offences which all nations had condemned. The rationale for such jurisdiction was the nature of certain offences, which affected the interests of all states, even when they were unrelated to State(s) assuming jurisdiction.

Piracy on the high seas, India noted, was the only one such crime, over which claims of universal jurisdiction was undisputed under general international law. It considered that the principle of universal jurisdiction in relation to piracy had been codified in the UN Convention on the Law of the Sea, 1982.

In respect of certain other crimes such as genocide, war crimes, and crimes against humanity and torture, India observed, international treaties have provided universal jurisdiction. They include, among others, the Four Geneva Conventions of 1949 and the Apartheid Convention.

The question that arises was whether the jurisdiction provided for specific serious international crimes in certain treaties could be converted into a commonly exercisable jurisdiction in respect of a wider range of offences.

Several issues remained unanswered including those related to the basis of extending the application of such jurisdiction, the relationship with the laws relating to immunity, pardoning and amnesty, and harmonization with domestic laws.

Several treaties obliged the states parties either to try a criminal for or handover trial to a party willing to do so. This was the obligation of *aut dedere, aut judicare* ("either extradite or prosecute"). This obligatory principle, India pointed out, should not be confused with the universal jurisdiction.

## KOREA

### DIPLOMATIC PROTECTION – IMMUNITY FROM JURISDICTION – INTERNATIONAL JUDICIAL JURISDICTION – INDIVIDUAL RIGHT OF CLAIM – VALIDITY OF FOREIGN JUDGMENT IN RELATION TO FUNDAMENTAL PRINCIPLES OF DOMESTIC LAW

***Yeoet.al. v. Nippon Steel & Sumimoto Metal Ltd* [2009Da68620. May 24, 2012]**

*Facts*

This case concerns claims for damages by victims of compulsory drafting under Japanese colonization. In 1942, the Plaintiff Yeo 00 and 4 others were born in Korea and were drafted by force to be factory workers in the post Nippon Steel Corporation and national service units. Contrary to their initial contract, the plaintiffs did not receive wages properly and were forced to work in a restricted area. Then, they returned to Korea after Japan was defeated. The plaintiffs claimed for damages of overdue wages, compulsory detention, forced labor, default on the contract, and torts in the Japanese court. However, in 2003, they finally lost the case in Supreme Court of Japan. Hereafter, the plaintiffs brought the same case against the defendant in Korean national court.

*Legal Issues*

This case was the first case to acknowledge the possibility of winning the case for the Korean citizens who were injured by the Japanese Corporations under the Japanese colonization on following issues:

> 1) Whether international judicial jurisdiction should be recognized; 2) The factors to review to approve the outcome of foreign (Japanese) judgment to decide whether the judgment is against Korea's good custom or other social order and whether to approve Japanese judgment against the plaintiffs; 3) Whether the legal identity of the defendant and the post Nippon Steel Corporation is the same; 4) Whether the right of claim of the plaintiffs, the victims of forced labor, has expired by Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation in 1965 (hereinafter "Agreement Concerning the Settlement Problems"); and 5) whether the defendant's statute of limitation argument is allowed

*Judgment*

The Supreme Court denied efficacy of Japanese Court's judgment that 'Japanese Corporation does not have a liability of compensation for the forced labor victims under the Japanese colonization' because such judgment is unconstitutional. The Supreme Court also confirmed the official opinion of the Joint Committee of Private and Public for the Following Countermeasure After Publication of Documents about Korea-Japan Conference (hereinafter "Joint Committee") in August 26, 2005 that was formed after this case was brought to the court.

> [Korea-Japan] Agreement Concerning the Settlement Problems was not an agreement to settle the compensation on Japanese colonization. Rather, it was to settle two countries' monetary and civil claim and obligation based on San Francisco Peace Treaty Article 4. The Agreement did not include settlement on the claims about crimes against humanity that Japanese governmental power or military power committed including military prostitution issue. Consequently, Japanese government is still liable about these issues. In addition, issues concerning Koreans in Sakhalin and victims of atomic bomb were not included in the Agreement as subject of right of claim.

The Supreme Court confirmed that Korea has actual relation to the concerned party and the matter of dispute. Thus, ruled that the Korean domestic court also has the international judicial jurisdiction on this case.

> The claim for compensation for damages resulted from illegal acts by post Nippon Steel Corporation in association with the Japanese government. They coerced or deceived the plaintiffs to the forced labor. Accordingly, the plaintiffs argue that such forced labor was illegal and that the defendant has the same legal liability that the post Nippon Steel Corporation still has on the plaintiffs. In addition, in this case, the Japanese government's illegal action was partially taken in Korea, the plaintiffs are all residing in Korea, and the content of issue is closely related to Korea's history and political change in situations.

Then, the Supreme Court ruled that whether to approve the past Japanese court's judgment on the same issue should be reviewed considering the fundamental principles that domestic law (including the Constitution) protects and the effect on the societal order if the foreign judgment is approved. Thus, the Supreme Court ruled as following:

> According to canon of the Constitution of Korea, Japanese Colonization of Korean peninsula was nothing more than an illegal occupation. Accordingly, the legal relationship arising from Japan's illegal occupation cannot coexist with the spirit of Constitution and, thus, has no legal effect. Therefore, approving the Japanese court's judgment as it stands is clearly against Korea's good custom and other societal order because the reasoning of judgment collides with the central value of the Korean Constitution. In conclusion, this court cannot approve the efficacy of the Japanese judgment.

In addition, on the issue about whether the post Nippon Steel Corporation is the same legal entity with the defendant, the Supreme Court ruled that it should be decided based on the Korean law at that time, not based on foreign Japanese law. In this case, the court ruled that the defendant maintained the same identity with the post Nippon Steel Corporation.

Lastly, concerning the statute of limitation on the right of claim, the court ruled that; first, the Korea-Japan Agreement Concerning Settlement Problems was to settle two countries' monetary and civil claim and obligation based on San Francisco Peace Treaty Article 4, not to settle the right of claim on the crimes against humanity that Japanese governmental power or military power committed. Second, the Supreme Court rejected the defendant's arguments on statute of limitation, determining that it is against the principle of good faith and abuse of a right as the following:

> relationship … until two countries established diplomatic relationship. Consequently, the plaintiffs could not have executed the judgment even if they got the judgment against the defendant in Korea. In addition, Although Korea and Japan entered into diplomatic relationship in 1965, the Korean citizens generally regarded that Korea-Japan Agreement Regarding Settlement Problems comprehensively covered the individual right of claim against Japan or Japanese people … because not every document related to the Agreement was publicized. … Especially, not until late 1990s, … people began to realize that right of claim arising out of the crime against humanity by Japanese government and illegal act directly related to the Japanese colonization was not expired by entering into the Agreement. Finally, [in 2005], … the Joint Committee announced a public opinion that the right of claim for crime against humanity that Japanese government participated in and the illegal acts directly related to Japanese colonization was not settled by the Agreement Concerning Settlement Problems. Therefore, based on these facts and the above-mentioned principles of law, the denial

> of fulfilling the obligation to the plaintiffs by the defendant who actually has the same legal identity as the post Nippon Steel Corporation is conspicuously unjust. Since such denial is abuse of right against the principle of good faith, it cannot be tolerated.

In conclusion, the Supreme Court ruled that the post Nippon Steel Corporation's compulsory mobilization of the plaintiffs for forced labor and not paying wages were illegal acts against Korean workers at that time. Thus, the defendant is liable for their damages. The original decision against the plaintiff was reversed and the case was remanded to the Seoul High Court.

***Park et.al v. Mitsubishi Heavy Industries Ltd***
**[2009Da22549. May 24, 2012]**

*Facts*

This case concerns claims for damages by victims of compulsory drafting under Japanese Colonization. In 1944, the plaintiffs, Park 00 and 5 others, were born in Korea and were forced to work in post Mitsubishi Heavy Industries Ltd and other shipyards. The plaintiffs brought claims for damages of compulsory drafting against the international law and other illegal acts in the Japanese court. However, in 2007, they finally lost the case in Supreme Court of Japan. Hereafter, the plaintiffs brought the same case against the defendant in Korean national court.

*Judgment*

This case was joined with the judgment for the case number 2009 DA 6820 in May 24, 2012. The legal issues in this case are identical to the other case and the same analysis was made. Thus, further explanation is omitted.

## SINGAPORE

### JURISDICTION – ACT OF STATE DOCTRINE – NON-APPLICABILITY OF FOREIGN JUDICIAL PROCEEDINGS

***WestLB AG v Philippine National Bank and Others*** **[2012] SGHC 162; [2012] 4 SLR 894**

*Facts*

This case involved a tussle for funds deposited in the plaintiff bank between four parties: (a) the first defendant, the Philippine National Bank ("PNB");

(b) the second to sixth defendants, which were foundations established in Vaduz, Liechtenstein and Panama ("the Foundations"); (c) the seventh defendants, human rights victims ("the HRVs") who suffered human rights abuses during the rule of Filipino President Ferdinand E Marcos; and (d) the tenth defendant, the Republic of the Philippines ("the Republic"). These Funds were originally part of a pool of assets held in various Swiss bank accounts held by the Foundations.

The Republic believed that the Swiss bank deposits were originally state-owned assets, that Marcos had siphoned away off during his tenure as President. In 1986, the Republic successfully obtained assistance from the Swiss authorities for the return of the Swiss deposits and the moneys were released in 1998 to PNB to hold as escrow agent pending a final decision of the Philippines courts in relation to the entitlement to the Swiss deposits. PNB deposited the Swiss moneys in various Singapore banks, including the plaintiff bank. In 2003, the Philippines Supreme Court ordered the Swiss moneys to be forfeited in favour of the Republic ("the Forfeiture judgment").

Meanwhile, the HRVs commenced a class action against Marcos in Hawaii for the human rights infringements suffered during his rule. The District Court of Hawaii ruled in favour of the HRVs and ordered Marcos' estate to assign more than US$1.9b for the HRVs' benefit, including all rights, title and interest in the Swiss banks. As this was not complied with, the Clerk of the District Court of Hawaii, Walter AY Chinn, executed an assignment on behalf of Marcos' estate to this effect ("the Chinn Assignment").

Relying on the proceedings between the Swiss and Philippines authorities to prove their claims, PNB argued that as escrow agent, it had legal title to the Funds and was entitled to repayment of them. The Republic relied on the series of events beginning from its request to the Swiss authorities for the release of the funds to the Philippines Supreme Court's forfeiture judgment, arguing that these were acts of state and were thus unimpeachable (the "Green Line Argument"). The HRVs relied on the assignment by the Clerk of the District Court of Hawaii to prove their title to the Funds. The Foundations' claim was based status as the 'original legal owners' of the Funds.

***Judgment***

On the 'act of state doctrine' argument, Justice Andrew Ang held:

38 Despite the appealing simplicity of the Green Line argument, however, it is fundamentally flawed in its assumption that the act of state doctrine applies in aid of the Republic's claim. The act of state doctrine immunises from judicial review the sovereign acts of a foreign state, which are automatically non-justiciable by reason of their sovereign nature. Where the doctrine applies, the forum court will refrain from adjudicating upon the propriety of the legislative or executive acts of a recognised foreign state within the limits of its own territory (Richard Fentiman, International Commercial Litigation (Oxford University Press, 2010) at paras 10.06 and 10.09; and Dicey, Morris & Collins, The Conflict of Laws vol 1 (Sweet & Maxwell, 14th Ed, 2006) ("Dicey, Morris & Collins vol 1") at paras 5–041 and 5–043). In what was probably the earliest formulation of the modern act of state doctrine, Chief Justice Fuller of the US Supreme Court held in *Underhill v Hernandez* 168 US 250 (1897) that:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

39 The doctrine limits, for prudential rather than jurisdictional, reasons, the forum court from inquiring into the validity of a recognised foreign sovereign's public acts committed within the latter's own territory (*Honduras Aircraft Registry Ltd v Government of Honduras* 131 F.3d 157 (11th Cir, 1997)). As such, it is separate and distinct from the doctrine of sovereign immunity (David Epstein & Charles S Baldwin, IV, International Litigation: A Guide to Jurisdiction, Practice and Strategy (Martinus Nijhoff Publishers, 4th Rev Ed, 2010) ("Epstein & Baldwin") at p 292).

40 Such restraint stemmed from the judicial recognition that certain disputes involving foreign sovereigns are not appropriately considered by the courts (Epstein & Baldwin at pp 278, 281–282). As was observed in *Banco Nacional de Cuba v Peter L F Sabbatino* 376 US 398 (1964) at 423:

> The act of state doctrine … arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the

> area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. … [emphasis added]

41 In *Underhill v Hernandez*, the defendant was a general in command of a revolutionary army in Venezuela which had seized the city Bolivar where the plaintiff, an American citizen, was resident. The plaintiff had constructed a waterworks system for Bolivar under a contract with the defeated government and also ran a machinery repair business. When he applied for a passport to leave the city, this was refused by the defendant who wished that the former would operate his waterworks and repair works for the benefit of the community and revolutionary forces. When the plaintiff was finally allowed to return to the US, he commenced proceedings in the Circuit Courts to recover damages caused by, inter alia, the defendant's refusal to grant him a passport, his alleged confinement in his own house and for alleged assaults and affronts by the defendant's subordinates. On appeal, Chief Justice Fuller declined a decision on the merits. The revolutionary government under which the defendant was acting had since been recognised by the US as the legitimate government of Venezuela. The defendant's acts were thus the acts of the government of Venezuela and, as such, were not properly the subject of adjudication in the courts of another country (*Underhill v Hernandez* at 254).

42 For the act of state doctrine to apply, the "act" in question must be a public governmental act and the subject-matter of the act must be located within the foreign sovereign's territory at the material time (Epstein & Baldwin at pp 279, 289). Further, there must exist a "factual predicate" for the doctrine to apply, ie, act of state issues only arise when the outcome of the case turns upon the effect of official action by a foreign sovereign (*WS Kirkpatrick & Co, Inc v Environmental Tectonics Corporatio, International* 439 US 400 (1990) at 406).

43 Turning to the present facts, the Green Line argument based on the act of state doctrine appears to be a red herring. First, the challenge mounted by the HRVs and the Foundations against the Republic's case is that the Forfeiture Judgment did not validly vest in the Republic an entitlement to the Funds. The Forfeiture Judgment, which was rendered by the Philippines Supreme Court, was

> not a legislative or executive act to which the act of state doctrine applies. Second, and more importantly, there is no issue arising for determination by this court as to the propriety of any foreign sovereign act. A close examination of the claims by the HRVs and the Foundations shows that neither contains a challenge as to the legitimacy of the Swiss freeze orders, the in-principle grant of the transmission of the Swiss Deposits to the Republic, the delegation of the determination of title to the Philippines courts and the subsequent transfer of the Swiss Deposits to Singapore. The act of state doctrine would have been relevant and of aid to the Republic had the challenge against its case been in relation to these listed acts. As this is not the case, the Republic's reliance on the act of state doctrine appears somewhat misplaced.
>
> 44 As stated, the crux of the dispute in relation to the Republic's entitlement to the Funds centred on the legal effect of the Forfeiture Judgment, viz, whether it passed beneficial title to the Republic, which would in turn depend upon whether the Forfeiture Judgment is in personam and penal in nature, as the HRVs and the Foundations assert. Given the foregoing, the act of state doctrine does not apply in this case.

# Law of the Sea

## CHINA

### TERRITORIAL BOUNDARY – DISPUTE – SUYAN ROCK

On March 13, 2012, Foreign Ministry Spokesperson Liu Weimin expressed China's position of the issue of Suyan Rock.

> The Suyan Rock is situated in the waters where the exclusive economic zones of China and the Republic of Korea [ROK] overlap. The ownership of the rock should be determined through bilateral negotiation, pending which neither of the two should take unilateral moves in these waters. China and the ROK have a consensus on the Suyan Rock, that is, the rock does not have territorial status, and the two sides have no territorial disputes.[59]

59 *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on March 12, 2012*, Ministry of Foreign Affairs of the People's Republic of China,

### TERRITORIAL BOUNDARY – DISPUTE – HUANGYAN ISLAND

**China has ample jurisprudential evidence supporting its sovereign rights over Huangyan island and there is no issue needing to be settled under International Tribunal on the Law of the Sea**

On April 18, 2012, Foreign Ministry Spokesperson Liu Weimin made a statement concerning Huangyan Island, the dispute over which the Philippine Foreign Minster proposed to submit to the International Tribunal on the Law of the Sea. He said:

> The Huangyan Island is China's inherent territory and there is no such issue of taking the dispute to the International Tribunal on the Law of the Sea. China has ample jurisprudential evidence supporting its sovereign rights over the Island. China was the first to discover and name the Huangyan Island and also the first to include it into China's territory and exercise sovereign jurisdiction over it. The waters surrounding the Huangyan Island has been a traditional fishing ground for Chinese fishermen. Since ancient times, Chinese fishermen have been fishing in waters surrounding the Island. China National Bureau of Statistics, China Earthquake Administration and State Oceanic Administration have carried out multiple scientific researches on the Huangyan Island and its adjacent waters. Prior to 1997, the Philippines had had no objection to the Chinese Government's exercise of sovereign administration, development and exploitation of the Huangyan Island, but instead, expressed on many occasions that the Island is outside the scope of Philippine territory. On the official Philippine maps published in 1981 and 1984, the Island is also marked outside Philippine territorial limits. The UN Convention on the Law of the Sea allows coastal states to claim a 200-nautical-mile exclusive economic zone, but coastal states have no rights to undermine other countries' inherent territorial sovereignty based on that. Any attempt to change the ownership of territorial sovereignty by using the UNCLOS is against international laws as well as the purpose and principle of the UNCLOS.[60]

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http://www.fmprc.gov.cn/mfa_eng /xwfw_665399/s2510_665401/2511_665403/t913936.shtml.

60 *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on April 18, 2012*, Embassy of the People's Republic of China in Libya, http://ly.chineseembassy.org/eng/fyrth/t925289.htm.

### OKINOTORI REEF – CONTINENTAL SHELF

Okinotori Reef, unable to sustain human habitation, shall have no exclusive economic zone or continental shelf. On May 16, 2012, an FM Spokesperson made a statement on the UN Commission on the Limits of the Continental Shelf's result of handling the Okinotori Reef issue.

> According to information released by the UN Commission on the Limits of the Continental Shelf, the Commission has adopted the result of handling Japan's claim of outer continental shelf. Japan's claim of its outer continental shelf based on Okinotori Reef was not acknowledged by the Commission. It is completely baseless that Japan alleged that the Okinotori Reefhad been recognised by the Commission as an "island".
>
> Actually, only 310,000 square km out of the 740,000 square km-claim of Japan submitted to the Commission is recognised by the Commission. The unrecognised claim includes the around 250,000 square km southern KyushuPalau ridge based on the Okinotori Reef.
>
> The Japanese side mentioned that the Shikoku basin to the north of the Okinotori Reef had been recognised by the Commission. However, the area, in fact, is based on other parts of Japan's land territory, completely irrelevant to the Okinotori Reef.
>
> After Japan submitted its claim to the Commission, China and the ROK have delivered multiple notes to the UN Secretary-General, stressing that in light of international law, the Okinotori Reef which cannot sustain human habitation shall have no exclusive economic zone or continental shelf and requesting the Commission not to recognise Japan's claim of outer continental shelf based on the Okinotori Reef. Many other countries have also voiced disagreements over Japan's illegitimate claim. The Commission's handling of Japan's claim including the Okinotori Reef issue is fair and reasonable, in compliance with international law, and has safeguarded the overall interest of the international community. China welcomes that decision.[61]

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61 *Foreign Ministry Spokesperson Hong Lei's Remarks on the UN Commission on the Limits of the Continental Shelf's Result of Handling the Okinotori Reef Issue*, Embassy of the People's Republic of China in Hungary, http://www.chinaembassy.hu/hu/fyrth/t933024.htm.

**TERRITORIAL BOUNDARY – DISPUTE – XISHA ISLAND – NANSHA ISLAND**

### Xisha and Nansha Islands are Chinese territory

On June 21, 2012, Foreign Ministry Spokesperson Hong Lei made a statement on the so-called Vietnamese Law of the Sea which places China's Xisha and Nansha Islands under Vietnam's so-called "sovereignty" and "jurisdiction".

> The Chinese Government hereby reaffirms: the Xisha and Nansha Islands are Chinese territory. China has indisputable sovereignty over the above islands and their adjacent waters. It is illegal and invalid for any country to lay territorial and sovereign claims to the Xisha and Nansha Islands or take any actions on that basis.[62]

**UNCLOS – SOUTH CHINA SEA – SIX-POINT PRINCIPLES ON THE SOUTH CHINA SEA ISSUE**

### China is open to discussion on the South China Sea issue and will uphold the principles of UNCLOS

On July 21, 2012, Foreign Ministry Spokesperson Hong Lei made remarks on the ASEAN foreign ministers' statement concerning the six-point principles on the South China Sea issue.

> The core of the South China Sea issue is disputes between relevant countries concerning the sovereignty over the Nansha Islands and demarcation of their adjacent waters. China has ample historical and legal basis for its sovereignty over the Nansha Islands and their adjacent waters.
>
> China is ready to work with ASEAN countries to fully and effectively implement the Declaration on the Conduct of Parties in the South China Sea (DOC) in a bid to jointly uphold peace and stability in the South China Sea. China is open to discussions with ASEAN countries on working out a Code of Conduct in the South China Sea (COC). We hope all parties can abide strictly by the DOC so as to create necessary conditions and atmosphere for the discussion of the COC.

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62 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 21, 2012*, Permanent Mission of the People's Republic of China to the UN, http://www.china-un.org/eng/fyrth/ t945296.htm.

> As a signatory to the UN Convention on the Law of the Sea (UNCLOS), China attaches great importance to upholding the principles and purposes of the UNCLOS. The Convention makes it clear right at the beginning that it aims at "establishing a legal order for the seas and oceans with due regard for sovereignty of all states". The Convention is not an international treaty to regulate disputes of territorial sovereignty between states, nor can it serve as the basis to arbitrate such disputes. Countries concerned should settle the demarcation disputes in the South China Sea on the basis of solving disputes of territorial sovereignty over the Nansha Islands, in accordance with historical facts and International Law including the UNCLOS.
>
> Giving high priority to its relations with ASEAN, China is committed to promoting good-neighbourly friendship and mutually beneficial cooperation with ASEAN and jointly advancing the process of East Asian cooperation. As the underlying impact of the international financial crisis continues to unfold, China and ASEAN share common interests in and responsibilities for safeguarding regional peace and stability and maintaining the development momentum in Asia. The two sides should continue to view and handle their relations from a strategic and long-term perspective, strengthen strategic communication and achieve mutual benefit and win-win progress in the spirit of mutual respect and trust.[63]

## SCOPE OF TERRITORIAL SEA BASE POINTS – STATE OCEANIC ADMINISTRATION

### State Oceanic Administration's measures on selection and protection of the protection scope of territorial sea base points

On September 11, 2012 the State Oceanic Administration promulgated the Measures on Selection and Protection of the Protection Scope of Territorial Sea Base Points. They provide that the State Oceanic Administration is responsible for supervising and directing the work of selection and protection of the protection scope of territorial sea base points, and that the detailed work of selection rests on the governments of provinces,

63 *Foreign Ministry Spokesperson Hong Lei's Remarks on ASEAN Foreign Ministers' Statement on the Six-Point Principles on the South China Sea Issue*, Ministry of Civil Affairs of the People's Republic of China http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t955114.shtml

autonomous regions and municipalities directly under the State Council where the base points are located.[64]

In accordance with the Measures, on December 3, 2012, the State Oceanic Administration promulgated the Technical Program on Selection and Definition of Protection Scope of Territorial Sea Base Points (Provisional Application). This Program made detailed provisions on the principles of selection and definition of protection scope, the working programs, the collection of materials, the on-site survey and the writing of the selection and definition reports.[65]

## XISHA ISLANDS, NANSHA ISLANDS, AND ZHONGSHA ISLANDS – REVISED REGULATIONS ON ADMINISTRATION OF COASTAL BORDER SECURITY

### On November 27, 2012, the 35th session of the standing committee of the fourth provincial People's Congress of Hainan Province revised the regulations on administration of coastal border security of Hainan Province

On November 27, 2012, the 35th Session of the Standing Committee of the Fourth Provincial People's Congress of Hainan Province revised the Regulations on Administration of Coastal Border Security of Hainan Province, which was adopted on November 26, 1999. The revised Regulations come into force on 1 January 2013.

In accordance with the statement made by the Spokesperson of the Standing Committee of the People's Congress of Hainan Province on 30 December 2012, the application scope of the Regulation was not revised. In accordance with the decision of the First Session of the Eighth National People's Congress on the establishment of Hainan Province on April 13, 1988, Xisha Islands, Nansha Islands, Zhongsha Islands, and their maritime areas are under jurisdiction of Hainan Province. Article 31 of the Revised Regulations provides that foreign ships and personnel shall comply with Chinese laws and regulations if they enter into the maritime areas under

64 海洋局印发《领海基点保护范围选划与保护办法》, The Central People's Government of the People's Republic of China, http://www.gov.cn/gzdt/2012-09/12/content_2222958.htm.

65 海洋局印发《领海基点保护范围选划技术规程》, China News (Dec. 3, 2012), http://www.chinanews.com/gn/2012/12-03/4377942.shtml.

the jurisdiction of Hainan Province and shall not commit any of the following acts in violation of administration of coastal border security: (1) illegal stopping or anchoring for the purpose of disturbing social order while passing the territorial sea areas under the jurisdiction of Hainan Province; (2) exiting or entering without examination or authorisation, or changing the port of exit or entry without authorisation; (3) landing illegally on any island or reef under the jurisdiction of Hainan Province; (4) destroying naval defense instalments or productivity or life installments on any island or reef under the jurisdiction of Hainan Province; (5) propaganda activities in violation of Chinese State sovereignty or endangering Chinese State security; and (6) other activities in violation of regulation of administration coastal border security in laws or regulations.[66]

## EAST CHINA SEA – CONTINENTAL SHELF

### Submission to the commission on the limits of the continental shelf

On December 14, 2012 China submitted to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8 of the Convention, information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured in part of the East China Sea. The executive summary of the Chinese submission states in paragraph 1:

> The geomorphologic and geological features show that the continental shelf in the East China Sea (hereinafter referred to as "ECS") is the natural prolongation of China's land territory, and the Okinawa Trough is an important geomorphologic unit with prominent cut-off characteristics, which is the termination to where the continental shelf of ECS extends. The continental shelf in ECS extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of China is measured.

In paragraph 5, titled "Natural Prolongation of Land Territory", the summary states:

> The shelf of ECS is of stable continental crust. At the Okinawa Trough, however, due to the upwelling of the upper mantle and the sharp thinning of the continental crust, the crust is transformed

66 海南省沿海邊防治安管理條例, The People's Government of Hainan Province, http://www.hainan.gov.cn:1500/data/law/2007/09/352/.

> from thinned continental crust to transitional crust. Nascent oceanic crust occurs in the central rifted zone of the south part of the Okinawa Trough. The shelf of ECS, the slope of ECS and the Okinawa Trough form a passive continental margin. The Okinawa Trough is the natural termination of the continental shelf of ECS.

China then gives the line of the outer limits of its continental shelf by connecting ten selected points in the Okinawa Trough, and also informs the Commission of that China, the Republic of Korea and Japan are yet to complete the delimitation of the continental shelf in the area involved in the submission.[67]

## INDIA

### LAW OF THE SEA – MARINE ENVIRONMENT – MARITIME TRADE AND SECURITY – PIRACY – CGPCS – THE LAW OF THE SEA CONVENTION, 1982

**Statement by India on Agenda Item 75 [A] and [B] – "Oceans and the Law of the Sea" at the 67th Session of the United Nations General Assembly on December 11, 2012[68]**

India noted that this year, the subject of oceans occupied a special place as the United Nations was commemorating the thirtieth anniversary of the opening for signature of the Convention on the Law of the Sea. While noting that the oceans play a vital role in supporting life on Earth, India pointed out that the outcome document of the United Nations Conference on Sustainable Development, which held in Rio de Janeiro, Brazil in June 2012, entitled "The Future we Want" recognized oceans and seas as an integrated and essential component of the Earth's ecosystem that were critical to sustaining it. According to India, this, however, was possible only through the proper management and use of ocean resources and the preservation and protection of marine environment. India also noted that

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67 *Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea*, United Nations Division for Ocean Affairs and the Law of the Sea, http://www.un.org/Depts/los/clcs_new/submissions_files/ chn63_12/executive%20summary_EN.pdf.

68 *See* Ministry of External Affairs, http://meaindia.nic.in.

the oceans were facing a number of challenges including from the illegal, unreported, and unregulated fishing, deterioration of the marine environment, biodiversity loss, climate change, and those relating to the maritime safety and security including the acts of piracy.

India expressed its serious concern over piracy and armed robbery at sea, particularly off the coast of Somalia. According to India, piracy was a grave threat to the freedom of the seas, maritime trade, and the security of maritime shipping. It endangered lives of seafarers, affected national security and territorial integrity, and hampered economic development of nations. While pointing out that India was actively cooperating in international efforts to combat piracy and armed robbery at sea, it sought to support the joint and concerted efforts by the international community to tackle this menace. In this regard, India expressed its deep appreciations for the Contact Group on Piracy off the Coast of Somalia (CGPCS), which, since its establishment in January 2009, was serving as an excellent forum for international cooperation and coordination in fight against piracy off the coast of Somalia.

The Law of the Sea Convention, 1982, India observed, was the key international instrument governing the ocean affairs. It sets out the legal framework for activities in oceans and seas, and is of strategic importance as the basis for national, regional, and global action in the marine sector. According to India, the effective and unhindered functioning of the institutions established under the Convention, namely the International Sea-bed Authority, the International Tribunal for the Law of the Sea, and the Commission on the Limits of the Continental Shelf were the key in achieving the goal of fair and equitable uses of oceans and their resources including through the effective implementation of the provisions of the Convention.

## INDONESIA

### TREATIES AND CONVENTIONS– RATIFICATION ON IMSAR 1979

**Presidential Regulation No. 30 of 2012 on the Ratification of International Convention Maritime Search And Rescue, 1979 With Annex And 1998 Amendments to the International Convention on Maritime Search and Rescue, 1979 (Resolution Maritime Safety Committee 70 (69)) (Regulation 30/2012)**

Regulation 30/2012 aims to ratify the International Convention Maritime Search And Rescue, 1979 With Annex And 1998 Amendments to the International Convention On Maritime Search And Rescue, 1979 (Resolution Maritime Safety Committee 70 (69)) that has been signed on April 27th, 1979 in Hamburg, Germany. Annex in this Convention has been amended on May 18th, 1998 through the Resolution Maritime Safety Committee 70 (69) and has became the 1998 Amendments to the International Convention on maritime Search and Rescue, 1979 (Resolution Maritime Safety Committee 70 (69)).[69] The Convention and the Annex are stipulated to form an international law in developing Search and Rescue services in national navigation in Indonesia seas or out of Indonesia seas.

## JAPAN

### TERRITORIAL BOUNDARY – DISPUTE – SENKAKU ISLANDS

On 16 April 2012, then Mayor of Tokyo, Shintaro Ishihara, announced at a symposium given by the Heritage Foundation in Washington, that in order to protect Japanese territory by the Japanese people, the Tokyo Metropolitan Government had decided to purchase the Senkaku Islands. The motive was is to secure Japanese territorial title over the islands by building ports and other facilities.

On 7 June, Japan's ambassador to China, Uichiro Niwa, criticized the Tokyo Metropolitan Government's plan to buy the islets, arguing that it could result in an extremely grave crisis in Japan-China bilateral relations. Foreign Minister Koichiro Genba immediately admonished Mr. Niwa over the remark indicating that it was his personal view and differed from the stance of the government. Foreign Minister Genba said that the change of ownership is a domestic matter that does not concern the international community.

The central government never accepted the plan of the Tokyo Metropolitan Government and on 27 August, rejected a request to send a survey team to the islands as part of the plan to purchase three of the five

69 Indonesia, *Presidential Regulation No. 30 of 2012 on Ratification of International Convention Maritime Search And Rescue, 1979 With Annex And 1998 Amendments to the International Convention On Maritime Search And Rescue, 1979 (Resolution Maritime Safety Committee 70 (69)), State Gazette of the Republic of Indonesia Year 2012 No. 79*, art. 1.

uninhabited islets. The team instead only observed the islets from a salvage vessel they chartered.

After the public announcement by Mayor Ishihara of his plan to purchase three of the islets, the Chinese government expressed its strong opposition to the plan and intensified its criticism. Under these circumstances, the Japanese government decided to nationalize the disputed islands in order to mitigate criticism from China and to keep peace and stable administration of the islands.

On 3 September 2012, an agreement was reached between the owner of the islands and the Japanese government to purchase three of five islands of Senkaku, that is, Uotsuri-island, Kitagojima-island and Minamikojima-island. On 11 September, the government purchased the islands for about $20,500,000 and completed the registration of transfer procedures.

## SINGAPORE

### TERRITORIAL BOUNDARY – DISPUTE – SOUTH CHINA SEAS – SCARBOROUGH SHOAL – STATEMENT OF POSITION

**Statement by Ministry of Foreign Affairs, 20 July 2012**

In response to media queries on the ASEAN Foreign Ministers' Statement on ASEAN's Six-Point Principles on the South China Sea issued by Cambodia as the ASEAN Chair on 20 July 2012, as well as to an article by Philippine Undersecretary for Foreign Affairs Erlinda Basilio published on 18 July 2012, Singapore was asked if wanted a specific mention of the Scarborough Shoal in the Joint Communiqué of the 45th ASEAN Ministerial Meeting (AMM), and how Singapore viewed the latest Statement, which does not include such a mention. In response to these queries, the MFA Spokesman said:

> Singapore was not one of the states that had taken the position that it was absolutely necessary for the Scarborough Shoal to be specifically mentioned in the Joint Communiqué. As previously mentioned, several ASEAN Member States (AMS) had tried very hard to negotiate a consensus on the South China Sea paragraph in the Joint Communiqué of the 45th AMM. To this end, Singapore as well as other AMS had made various proposals which did not refer specifically to Scarborough Shoal or other geographical features.
>
> As stated previously, Singapore has supported and welcomed the statement that has been issued.

**Minister for Foreign Affairs K Shanmugam's reply to Parliamentary Questions and Supplementary Questions, 13 August 2012**

Sir, to begin, I would like to restate Singapore's position on the South China Sea disputes. We are not a claimant state and we have always maintained that by their very nature, the specific territorial disputes in the South China Sea can only be settled by the parties directly concerned. However, that does not mean that Singapore has no interests in these disputes. Singapore's interests in the disputes, and the South China Sea, including on the question of the freedom of navigation, have been stated clearly on several occasions and I do not propose to repeat them here.

2 It is useful to revisit the roots of ASEAN and how it is important to Singapore, as this will allow us to see the present developments in context. Many in this House know that Singapore was one of the founding members of ASEAN when it was established in 1967, along with Indonesia, Malaysia, the Philippines and Thailand. Our governments forged a common cause to maintain order in our region amidst the Cold War. Order was the essential precondition for development and prosperity for our peoples. We agreed to build a region united by a desire for stability and autonomy, promoting regional cooperation rather than competition, to fend off the alternative of a splintered Southeast Asia which would have become an arena for Cold War protagonists and their proxies.

3 Forty-five years on, this imperative still holds true. Building a strong, cohesive and autonomous ASEAN remains a key goal of our foreign policy. ASEAN helps its members manage the inherent complexities of the region as well as the evolving geopolitical order in the Asia-Pacific. Only a united ASEAN can credibly play a central role in engaging major powers towards the common goal of promoting regional peace, stability and prosperity. This strategic underpinning of ASEAN was given fresh impetus with the signing of our Charter in Singapore on 20 November 2007, which ushered ASEAN into a new phase of rules-based and principled regional norms. We agreed to build an ASEAN Community with a capital 'C' in 2015. We recognised that an ASEAN Community is critical for maintaining ASEAN's competitiveness in the region and globally.

4 It was thus regrettable that no Joint Communiqué was issued at the 45th ASEAN Ministerial Meeting (AMM) in Phnom Penh in July 2012. I say this because the lack of a Joint Communiqué reflects disunity within

ASEAN. ASEAN unity and centrality are key to the vision of the ASEAN Community. An ASEAN that is not united and cannot agree on a Joint Communiqué will have difficulties in playing a central role in the region. If we cannot address major issues affecting or happening in our region, ASEAN centrality will be seen as a slogan without a substance. Our ability to shape regional developments will diminish.

5 The reason why there was no Joint Communiqué was that there was no consensus on how to reflect recent developments in South China Sea in the Communiqué. We worked hard to find a compromise. But a compromise could not be reached because of the distance between positions taken by ASEAN members. While several draft formulations were put forward in an effort to bridge the gap, they were unfortunately rejected by one side or the other and the ASEAN Ministerial Meeting ended without a Joint Communiqué. All of us were heartened and appreciative that Indonesia managed to broker a common ASEAN position a week after the meetings ended. The ASEAN statement on "Six-Point Principles on the South China Sea" released on the 20 July 2012 has gone some way to repair the damage to ASEAN's credibility, but more work needs to be done.

6 Some Members have asked about the impact of this incident on ASEAN's community building efforts. While the Phnom Penh meetings were a setback, I do not think that this in itself will divert us from our goals. We must press on with this important task despite the setback. As between ASEAN members, there is much that needs to be done and should be done to achieve the goal of an ASEAN Community. We must work on that within ASEAN. The setback in Phnom Penh will of course have some impact on ASEAN's relationships with external partners, in our push for ASEAN Community. The state of the global economy will also have an impact.

7 I said earlier that the failure to issue a Communiqué was linked to recent developments in the South China Sea. As the House knows, territorial claims in the South China Sea involve four ASEAN states and China. However, the claims are not the totality of ASEAN-China interactions, simply one part of many. All ASEAN members regard China as an important and valued partner. The strength of relations is demonstrated by our bilateral trade, which has grown from less than US$10 billion in 1991 to more than US$230 billion in 2010, making China ASEAN's largest trading

partner and ASEAN China's third largest trading partner. The ASEAN-China Free Trade Agreement also entered into force on 1 January 2010. Beyond economics, ASEAN-China cooperation spans across eleven sectors, including environment, culture, and health. China has consistently been one of the strongest supporters of ASEAN's Community Building efforts, and has devoted effort and resources to help the region. It is clearly in ASEAN's and China's interests to maintain and strengthen cooperation for mutual benefit.

8 I have set out these areas of cooperation to provide some context to the heated debate on the outcome of the 45th AMM, the role that China may or may not have played, and the impact on ASEAN-China relations. I think it is simplistic to try and identify any one actor or cause for what happened in Phnom Penh. There were many actors and many causes for the way the events unfolded.

9 ASEAN and all major powers share a common interest in maintaining peace and stability in the South China Sea. ASEAN needs to work closely with China, a claimant state, to promote cooperation and manage tensions in the area. A good start is the full implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC) that both sides signed in 2002 to build confidence and trust amongst the participants. In the same way, ASEAN and China should start talks on a Code of Conduct in the South China Sea (COC) soon. Recent tensions in the South China Sea underscore the need for the COC discussions to take place sooner rather than later. That would be in everyone's interest. I wish to underscore that ASEAN as a grouping cannot and does not take sides on the merits of a particular claim or claims. Nor do we attempt to resolve the disputes. That is a matter for the parties directly concerned. ASEAN's consistent collective position on the issue is that all parties should refrain from the use of force and work together to resolve disputes in accordance with international law, in particular the 1982 United Nations Convention on the Law of the Sea. Thank you sir.

# Legal Personality

## KOREA

### FUNDAMENTAL HUMAN RIGHTS OF FOREIGNERS – ILLEGAL ALIENS – SUBSTANTIVE RIGHT TO APPEAL TO A CONSTITUTIONAL COURT

## [2008Hun-Ma430. August 23, 2012]

*Facts*

In 1991, the Claimant from Nepal entered into Korea with 15 days qualified visitor's visa. In 1998, the Claimant from Bangladesh entered into Korea with 90 days qualified visa waiver program. Both claimants did not leave Korea after the expiration of qualified period. In addition, since 2008, they worked as the chairman and the vice-chairman of the Migrants' Trade Union (MTU). On May 2, 2008, the Seoul immigration office detained them in Cheong-ju foreigner protection place as they were classified as subjects to compulsory deportation under immigration law. The immigration office filed orders for compulsory deportation afterward.

The claimants made an objection and brought an administrative proceeding to revoke the deportation orders. However, in May 15, 2008, the respondent began the execution and deported the claimants by sending them to Bangkok through airplane. Thereafter, the claimants brought this case to the Constitutional Court by arguing that the emergency protection and execution of the order of protection and the order of compulsory deportation and its execution violated their fundamental rights.

*Legal Issues*

The main issue was violation of the claimant's fundamental rights, but prior to this, the court made judgment on the following issues:

1) Whether the claimants are subject to make a constitutional appeal on the fundamental rights in the constitutional court under the Constitutional Court Act Article 68, Section 1.

2) Whether the foreigner can be subjected to fundamental right that is not only citizen's right but also fundamental human right.

*Judgment*

The Constitutional Court ruled that although the claimants are illegal aliens, they could make a constitutional appeal as subjects of fundamental human rights.

> Illegal stay simply means that the claimants are not qualified to stay according to the law. Consequently, as human rights, certain fundamental rights of foreigners do not depend on whether they are qualified to stay. … The personal liberty, freedom of residing, right to have lawyer, right to bring the case to the court and other alleged violated rights fall under human rights. Therefore, the claimants have rights to these fundamental rights.

# Municipal Law

## INDIA

### THE RULE OF LAW – INTERNATIONAL PEACE AND SECURITY – NATIONAL LEVEL – INTERNATIONAL LEVEL

**Statement by India on Agenda Item 83: "The Rule of Law at the National and International Levels" at the 67th Session of the United Nations General Assembly on October 10, 2012[70]**

India noted that the outcome document reaffirms commitment of the international community towards the rule of law and adhering, for their purpose, to the principles of the United Nations Charter and international law. India further noted that the document took stock of the contemporary political, social, and economic conditions and stressed upon the implementation of the rule of law related principles in order to achieve the objective of the maintenance of international peace and security, peaceful co-existence, and development. India also noted that the document stressed the importance of continuing efforts to reform the Security Council. India considered it essential to reform the Security Council at the earliest possible to make the body broadly representative, efficient, and transparent. It strongly condemned the acts of terrorism wherever,

70 *See* Ministry of External Affairs, http://meaindia.nic.in.

whenever, and by whomever committed. It stressed for collective action in the fight against terrorism, which continues to pose a serious threat to the international peace and security. India believed that the advancement of the rule of law at the national level was essential for the protection of democracy, economic growth, sustainable development, ensuring gender justice, eradication of poverty and hunger, and protection of human rights and fundamental freedoms. India considered that the law making activity at the national level was exclusively the domain of the national legislature.

## PHILIPPINES

### PREVENTION OF CYBERCRIME – DOMESTIC AND INTERNATIONAL LEVELS – FULL FORCE AND EFFECT OF INTERNATIONAL INSTRUMENTS

**An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes**

Republic Act No. 10175, or the Cybercrime Prevention Act of 2012, punishes cybercrime and other offenses (Ch. II). As part of State policy, it says that the State shall adopt sufficient powers to effectively prevent and combat such offenses by facilitating their detection, investigation, and prosecution at both the domestic and international levels, and by providing arrangements for fast and reliable international cooperation (Sec. 2).

The law states that all relevant international instruments on international cooperation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws, to the widest extent possible for the purposes of investigations or proceedings concerning criminal offenses related to computer systems and data, or for the collection of evidence in electronic form of a criminal offense, should be given full force and effect (Sec. 22). An office within the Department of Justice of the Philippines was created as central authority in all matters related to international mutual assistance and extradition (Sec. 23).

**TREATIES – LABOR CONTRACTS**

***Magsaysay Maritime Corporation and/or Wastfel-Larsen Management A/S v. Oberto S. Lobusta* [G.R. No. 177578. 25 January 2012]**

Magsaysay Maritime Corporation is a domestic corporation and the local manning agent of the vessel MV "Fossanger" and of petitioner Wastfel-Larsen Management A/S. Lobusta is a seaman who has worked for Magsaysay Maritime Corporation since 1994. In March 1998, he was hired again as Able Seaman by Magsaysay Maritime Corporation in behalf of its principal. The employment contract provides for his basic salary, and overtime pay. It also provides standard terms and conditions governing the employment of Filipino seafarers on board ocean-going vessels, approved per Department Order No. 33 of the Philippines' Department of Labor and Employment and Memorandum Circular No. 55 of the Philippine Overseas Employment Administration (POEA Standard Employment Contract), both series of 1996, which shall be strictly and faithfully observed.

Lobusta boarded MV "Fossanger" in 1998. After two months, he complained of breathing difficulty and back pain. While the vessel was in Singapore, he was admitted to a hospital and diagnosed to be suffering from severe acute bronchial asthma with secondary infection and lumbosacral muscle strain. He was certified as fit for discharge for repatriation for further treatment. A series of tests and consultations with doctors ensued in the Philippines. He was declared not physically fit to resume his normal work as a seaman. A complaint for disability/medical benefits was filed before the National Labor Relations Commission (NLRC).

The Labor Arbiter rendered a decision ordering Magsaysay Maritime Corporation to pay Lobusta (a) US$2,060 as medical allowance, (b) US$20,154 as disability benefits, and (c) 5% of the awards as attorney's fees. The arbiter ruled that Lobusta suffered illness during the term of his contract. The arbiter held that provisions of the Labor Code, as amended, on permanent total disability do not apply to overseas seafarers. An appeal was lodged before the NLRC, which was dismissed. The Court of Appeals declared that Lobusta is suffering from permanent total disability and increased the award of disability benefits in his favor to US$60,000

Now, before the Supreme Court, Magsaysay Maritime Corporation argued, among others, that the Court of Appeals erred in applying the provisions of the Labor Code instead of the provisions of the POEA con-

tract in determining Lobusta's disability. The Supreme Court held that not only must the POEA Standard Employment Contract be considered in determining disability. It cited jurisprudence to state (1) that the standard employment contract for seafarers was formulated by the POEA pursuant to its mandate; (2) that the 1996 POEA Standard Employment Contract itself provides that all rights and obligations of the parties to the contract, including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants where the Philippines is a signatory; and (3) that even without this provision, a contract of labor is so impressed with public interest that the Civil Code expressly subjects it to special laws. Magsaysay Maritime Corporation and/or Wastfel-Larsen Management A/S was ordered to pay Lobusta US$65,163 as total award.

**TREATIES – LABOR CONTRACTS**

***PhilAsia Shipping Agency Corporation and/or Intermodal Shipping, Inc. v. Andres G. Tomacruz* [G.R. No. 181180. 15 August 2012]**

Tomacruz was a seafarer, whose services were engaged by PhilAsia Shipping Agency Corp., on behalf of Intermodal Shipping, Inc. In 2002, the parties signed a 12-month Philippine Overseas Employment Administration (POEA) Contract of Employment. Before he boarded M/V Saligna, he underwent a pre-employment medical examination and he was certified fit to work. While in Japan, blood was discovered in his urine and a kidney stone was diagnosed in his right kidney. He was still allowed to continue working. He repatriated to the Philippines, went to doctors and found stones in both his kidneys, but he was certified fit to work. PhilAsia Shipping Agency Corp. told him that because of the huge amount spent on his treatment, their insurance company did not like his services anymore.

Tomacruz filed a complaint for disability benefits, sickness wages, damages, and attorney's fees against PhilAsia Shipping Agency Corp. The Labor Arbiter held that as a contractual employee, his employment was governed by the contract signed every time he was hired. Once services were terminated, the employer was under no obligation to re-contract him. The company doctor gave a more accurate assessment of his condition. The National Labor Relations Commission (NLRC) agreed with the arbiter. The

claim for benefits was not granted. On appeal, the Court of Appeals granted the claim on the basis that he suffered from permanent total disability.

The core issue is the propriety of the appellate court's award of benefits to Tomacruz on the basis of the Labor Code provisions on disability and despite the company-designated physician's declaration of his fitness to work. The Supreme Court once again held that the entitlement of seafarers to disability benefits is governed not only by medical findings but also by contract and by law. Pertinent to international law, it resonated that the Philippine standard overseas employment contract provides that all rights and obligations of the parties to the contract, including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants where the Philippines is a signatory.

## Sovereignty

### CHINA

#### CHINA-INDIA RELATIONS – CHINA – TREATIES AND CONVENTIONS

**India agrees on the establishment of a working mechanism for consultation and co-ordination on India-China border affairs**

On January 17, 2012, China and India concluded an agreement on the establishment of a working mechanism for consultation and co-ordination on China–India border affairs. The full text of the agreement is as follows:

The Government of the People's Republic of China and the Government of the Republic of India (hereinafter referred to as the "two sides");

Firmly believing that respecting and abiding by the Line of Actual Control pending a resolution of the Boundary Question between the two countries as well as maintaining and strengthening peace and tranquillity in the China–India border areas is very significant for enhancing mutual trust and security between the two countries, for resolving the Boundary Question at an early date and for building the China–India Strategic and Cooperative Partnership for Peace and Prosperity;

Desiring to materialise the spirit of the Agreement between the Government of the People's Republic of China and the Government of the

Republic of India on the Maintenance of Peace and Tranquillity Along the Line of Actual Control in the China–India Border Areas signed on 7th September 1993, the Agreement between the Government of the People's Republic of China and the Government of the Republic of India on Confidence Building Measures in the Military Field Along the Line of Actual Control in the China-India Border Areas signed on 29th November 1996 and the Protocol between the Government of the People's Republic of China and the Government of the Republic of India on Modalities for the Implementation of Confidence Building Measures in the Military Field Along the Line of Actual Control in the China-India Border Areas signed on 11th April 2005;

Aiming for timely communication of information on the border situation, for appropriately handling border incidents, for earnestly undertaking other cooperation activities in the China–India border areas, have agreed as follows:

> Article I
>
> The two sides agree to establish a Working Mechanism for Consultation and Coordination on China-India Border Affairs (hereinafter referred to as "the Working Mechanism") to deal with important border affairs related to maintaining peace and tranquillity in the China-India border areas.
>
> Article II
>
> The Working Mechanism will be headed by a Director General level official from the Ministry of Foreign Affairs of the People's Republic of China and a Joint Secretary level official from the Ministry of External Affairs of the Republic of India and will be composed of diplomatic and military officials of the two sides.
>
> Article III
>
> The Working Mechanism will study ways and means to conduct and strengthen exchanges and cooperation between military personnel and establishments of the two sides in the border areas.
>
> Article IV
>
> The Working Mechanism will explore the possibility of cooperation in the border areas that are agreed upon by the two sides.

Article V

The Working Mechanism will undertake other tasks that are mutually agreed upon by the two sides but will not discuss resolution of the Boundary Question or affect the Special Representatives Mechanism.

Article VI

The Working Mechanism will address issues and situations that may arise in the border areas that affect the maintenance of peace and tranquillity and will work actively towards maintaining the friendly atmosphere between the two countries.

Article VII

The Working Mechanism will hold consultations once or twice every year alternately in China and India. Emergency consultations, if required, may be convened after mutual agreement.

Article VIII

This Agreement shall come into force on the date of its signature. It may be revised, amended, or terminated with the consent of the two sides. Any revision or amendment, mutually agreed by the two sides, shall form an integral part of this Agreement. Signed in duplicate in Hindi, Chinese and English languages at New Delhi, on 17th January 2012, all three versions being equally authentic. In case of divergence the English text shall prevail.[71]

## TAIWAN – ONE-CHINA PRINCIPLE – DIPLOMATIC RELATIONS WITH TAIWAN

### Countries should adhere to the one-China principle with regard to their relations with Taiwan

On February 22, 2012, Foreign Ministry Spokesperson Hong Lei made a statement regarding Taiwan's attempt to make official its relation with countries with which it has no diplomatic relation and to participate in inter-governmental organisations and UN agencies in the "capacity of a government". He said:

71 The Chinese version *available at* http://www.fmprc.gov.cn/mfa_chn/wjb_602314/zzjg_602420/ bjhysws_603700/bhfg_603706/t947958.shtml; the English version *available at* http://www.mea.gov.in/ bilateral-documents.htm?dtl/17963/.

> We do not object to non-governmental economic, trade and cultural exchanges between Taiwan and countries that have diplomatic relations with us, but we oppose any official interactions or the signing of official agreements between them or Taiwan's participation in international organisations that are limited to sovereign states only.
>
> The remarks by some people in Taiwan you mentioned are a violation of and challenge to the one-China principle universally recognised by the international community. It is wrong and very harmful. We hope and believe that relevant countries will continue to adhere to the one-China principle, prudently handle Taiwan-related issues and take concrete actions to support the peaceful development of cross-Straits relations.[72]

## JURISDICTION – ESTABLISHMENT OF SANSHA MUNICIPALITY – XISHA ISLANDS, NANSHA ISLANDS, AND ZHONGSHA ISLAND

### Change of Administrative Jurisdiction

On June 21, 2012, the Ministry of Civil Affairs announced that with the approval of the State Council, the Agency on Xisha Islands, Nansha Islands and Zhongsha Islands under Hainan Province has been discontinued, and that a new Sansha Municipality has been established, with the jurisdiction over Xisha Islands, Zhongsha Islands, Nansha Islands, as well as their maritime areas. The announcement further stated that the People's Government of the new Sansha Municapality is stationed on the Yongxing Island of Xisha Islands.

The spokesperson of the Ministry of Civil Affairs made the statement that:

> China is the first country to discover, name and exercise continuous sovereign jurisdiction over Xisha Islands, Zhongsha Islands, Nansha Islands and their maritime areas. After the establishment of the People's Republic of China, the Agency on Xisha Islands, Nansha Islands and Zhongsha Islands was established in 1959. This Agency was directly under the leadership of Hainan administrative region, and exercised jurisdiction over Xisha Islands, Zhongsha

72 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on February 22, 2012*, Ministry of Foreign Affairs of the People's Republic of China, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399 /s2510_665401/2511_665403/t908252.shtml.

> Islands, Nansha Islands and their maritime areas. In 1988, Hainan administrative region was abolished, and Hainan Province was established. This Agency was therefore under the jurisdiction of Hainan Province. The establishment of Sansha Municipality is the adjustment and refinement of China's administrative management regime on Xisha Islands, Zhongsha Islands, Nansha Islands and their maritime areas of Hainan Province.[73]

## DIAOYU DAO DISPUTE

### Baselines of the Territorial Sea of Diaoyu Dao and its Affiliate Islands

On September 10, 2012, in accordance with the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone adopted and promulgated on February 25, 1992, the Government of the People's Republic of China announced the baselines of the territorial sea adjacent to Diaoyu Dao and its affiliated islands of the People's Republic of China.[74]

## DIAOYU DAO ISLAND DISPUTE – ACT ON THE PROTECTION OF SEA ISLANDS

### State Oceanic Administration and the ministry of civil affairs jointly publicised the standardised names of the Diaoyu Island

In accordance with the Act on the Protection of Sea Islands, the State Oceanic Administration standardised the names of islands in the Chinese maritime area. With the approval of the State Council, the State Oceanic Administration and the Ministry of Civil Affairs jointly publicised the

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73 民政部新闻发言人就国务院批准设立地级三沙市答记者问, Ministry of Civil Affairs of the People's Republic of China, http://www.mca.gov.cn/article/zwgk/mzyw/201206/2012060032507 5.shtml.

74 *Statement on the Government of the People's Republic of China On the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands*, United Nations Division for Ocean Affairs and the Law of the Sea, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ DEPOSIT/chn_mzn89_2012_e.pdf; *see also*, *The Chart of Baselines of Territorial Sea of Diaoyu Dao and its Affiliated Islands of the People's Republic of China*, United Nations Division for Ocean Affairs and the Law of the Sea, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ MAPS/chn_mzn89_2012.jpg.

standardised names of the Diaoyu Island and part of its affiliated islands on March 2, 2012.[75]

On September 25, 2012, the State Council Information Office released a white paper on Diaoyu Island and its affiliated islands titled "Diaoyu Dao, An Inherent Territory of China".[76]

#### TIBET – DALAI LAMA'S VISIT TO JAPAN

**Tibet is an inalienable part of China**

On November 13, 2012, Foreign Ministry Spokesperson Hong Lei made a statement on Dalai's address to an audience of 140 Japanese parliamentarians in the Japanese Upper House. He said:

> Tibet is an inalienable part of China. Under the cloak of religion, Dalai is a political exile who has long been engaged in activities aimed at splitting China on the international stage. We are firmly opposed to the provision of support by any country or any person to Dalai in any form for his anti-China separatist activities.[77]

## PHILIPPINES

#### SOVEREIGN IMMUNITY – IMMUNITY FROM SUIT – CONSENT – ARBITRATION

***China National Machinery and Equipment Corporation v. Hon. Cesar D. Santamaria, et al.* [G.R. No. 185572. 7 February 2012]**

China National Machinery and Equipment Corp. (CNMEG) entered into a Memorandum of Agreement with North Luzon Railways Corp. (Northrail) for the conduct of a feasibility study on a railway line (Northrail Project).

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75 国家海洋局、民政部受权公布我国钓鱼岛海域部分地理实体标准名称 State Oceanic Administration People's Republic of China, http://www.soa.gov.cn/xw/ztbd/2012/dydszgdsslt/ dydszgdsslt_549/201211/t20121129_11361.htm.

76 钓鱼岛是中国的固有领土》白皮书（全文）, Ministry of Foreign Affairs of the People's Republic of China, http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/tytj_611312/zcwj_611316/ t973235.shtml.

77 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on November 13, 2012*, Embassy of the People's Republic of China in the Republic of Finland, http://www.chinaembassy-fi.org/eng/ fyrth/t988806.htm.

CNMEG is a corporation organized and created under Chinese law. The Export Import Bank of China (EXIM Bank) and the Philippines' Department of Finance (DOF) entered into a Memorandum of Understanding in which China agreed to finance the Northrail Project. The Chinese government designated EXIM Bank as lender and the DOF as borrower. The amount of US$400 million was extended to the borrower, payable in 20 years. The Chinese Ambassador to the Philippines, Wang Chungui, wrote a letter to DOF Secretary Jose Isidro Camacho informing him of CNMEG's designation as the Prime Contractor for the project. Several agreements were entered into. Several individuals, herein respondents, filed a complaint contending that the Contract and Loan Agreements were void for being contrary to the Constitution and other laws.

One of the issues considered by the Court is whether CNMEG was immune from suit, therefore, precluded from being sued before Philippine domestic courts. The Supreme Court held that CNMEG was not entitled to immunity from suit. It explained the doctrine of sovereign immunity as embodied in Philippine jurisprudence. There are two conflicting concepts. On the one hand, the *classical or absolute theory* states that a sovereign cannot, without its consent, be made a respondent in the courts of another sovereign. On the other, the *restrictive theory* holds that the immunity of the sovereign is recognized only as regards public acts or acts *jure imperii* of a State, but not with regard to private acts or acts *jure gestionis*. The Philippines adheres to the restrictive theory. Immunity cannot extend to commercial, private and proprietary acts. The State may be said to have descended to the level of an individual, and thus, has given its consent to b sued when it enters into business contracts.

CNMEG was engaged in a proprietary activity. It is true that the contract agreement does not reveal that the project was as proprietary activity. However, the same could be seen in conjunction with three other documents, namely, the Memorandum of Understanding between Northrail and CNMEG, the Letter of Ambassador Wang to Secretary Camacho, and the Loan Agreement. It was a purely commercial transaction. Mere entering into a contract by a foreign State with a private party cannot be the ultimate test, and such act is only the start of the inquiry. Even if CNMEG contends that it performs governmental functions (China designated the corporation), it failed to adduce evidence that it has not consented to be sued under Chinese law.

When a State or international agency wishes to pleas sovereign or diplomatic immunity in a foreign court, it requests the foreign office of the State where it is sued to convey to the court that it is entitled to immunity. CNMEG failed to present a certification to that effect from the Philippines' Department of Foreign Affairs. Lastly, the stipulation in one of the agreements to submit any dispute to arbitration may be construed as an implicit waiver of the immunity from suit.

## SINGAPORE

### SOVEREIGNTY OVER PEDRA BRANCA – IMPLEMENTATION OF ICJ JUDGMENT – JOINT TECHNICAL COMMITTEE

**Joint Press Statement by H.E. Dato' Sri Anifah Aman, Minister of Foreign Affairs, Malaysia and H.E. K. Shanmugam, Minister for Foreign Affairs, Republic Of Singapore: Sixth Meeting of the Malaysia-Singapore Joint Technical Committee on the Implementation of the International Court of Justice Judgment on Pedra Branca, Middle Rocks and South Ledge, Kuala Lumpur, 22-23 February 2012**

Malaysia and Singapore met on 22-23 February 2012 in Kuala Lumpur to further discuss the implementation of the International Court of Justice (ICJ) Judgment on Pedra Branca, Middle Rocks and South Ledge. The Malaysian delegation was led by Tan Sri Mohd Radzi Abdul Rahman, Secretary-General of the Ministry of Foreign Affairs, Malaysia and the Singapore delegation was led by Mr Bilahari Kausikan, Permanent Secretary of the Ministry of Foreign Affairs, Singapore.

The Meeting continued discussions on related issues arising from the International Court of Justice (ICJ) Judgment on the Case Concerning Sovereignty over Pedra Branca, Middle Rocks and South Ledge.

The Meeting endorsed the Report of Survey of the Joint Hydrographic Survey in and around Pedra Branca and Middle Rocks and took note of the Summary of Work by the Sub-Committee of the Joint Survey Works in and around Pedra Branca, Middle Rocks and South Ledge. The Meeting commended the Sub-Committee on the successful completion of the Joint Survey Works. With the completion of the work of the Sub-Committee in accordance with its Terms of Reference, the Meeting agreed to the dis-

solution of the Sub-Committee on the Joint Survey Works in and around Pedra Branca, Middle Rocks and South Ledge.

The Meeting agreed that the Seventh Meeting of the Malaysia-Singapore Joint Technical Committee (MSJTC) on the Implementation of the International Court of Justice (ICJ) Judgment on Pedra Branca, Middle Rocks and South Ledge will be held in September 2012.

## Terrorism

### BANGLADESH

#### UN CONVENTION; BI-LATERAL – REGIONAL OR INTERNATIONAL TREATY – SECURITY COUNCIL RESOLUTIONS ON TERRORISM – INTERNATIONAL TERRORISM – TERRORIST FINANCING

**The Anti Terrorism (Amendment) Act 2012 (Act 6 of 2012), amending the Anti-terrorism Act 2009 – the Act is in compliance with the SAARC Regional Convention on Suppression of Terrorism 1987, International Convention for the Suppression of Terrorist Bombings 1997 and a response of the UN Security Council Resolution 1373/2001.**

The Bangladesh Parliament enacted the Anti-terrorism Act 2009 in February 2009 to prevent and effectively punish certain terrorist activities. In 2012, the Anti-terrorism Act of 2009 has been further amended via the Anti-terrorism (Amendment) Act 2012, which came into force on 20 February 2012. This amending Act further internationalises the anti-terrorism regime that was provided by the Anti-terrorism Act 2009 (Act 16 of 2009), which too was in line with international standards.

The amending Act of 2012, along with the anti-money-laundering legislation noted above, seeks to provide new rules to prevent terrorist financing. The amending Act is thus informed of regional and international anti-terrorism instruments.[78] For example, newly inserted section 17(e) of the Anti-terrorism Act 2009 refers to the UN Resolution Nos. 1267 and 1373

78 Such as, for example, the SAARC Regional Convention on Suppression of Terrorism 1987; International Convention for the Suppression of Terrorist Bombings 1997. Also, the Act seems to be informed of a UN SC Resolution, the UN SC RES 1373/2001/28 September, that calls on states to work together urgently to prevent and suppress terrorist acts, including through including through increased

and to other resolutions accepted by Bangladesh while defining a terrorist organisation.[79] Accordingly, section 15(3) as amended by the 2012 Act refers to UN resolutions and applicable standards under any UN convention.

The amending Act replaces section 6 of the original Act of 2009, which defines and criminalises terrorist activities. The amended section 6 provides that,[80]

(1) If any person, by creating horror amongst the public or segment of the public and with an intent to jeopardize the territorial integrity, solidarity, security or sovereignty of Bangladesh, for the purpose of compelling the government or any other person to do or not to do an act –

(a) causes death, inflicts grievous hurt, confines or abducts any person or causes damage or assists in causing damage to any property of a person; or

(b) entices others to kill any person, or inflict upon him grievous hurt, or to confine or abduct him or to cause damage to property of the state, entity or of any individual,

(c) uses or keeps in his possession any explosive, flammable substance, or firearms, or

(d) If any person commits or attempts to commit or incites others to commit any offence to jeopardize the security of any foreign country or to cause damage to its property, or if any person is personally or financially involved in such activities against a foreign state, or

(e) if any person or entity keeps in possession any property derived from any terrorist activity or given by any terrorist individual or groups, of

(f) if any person, being a foreign national, commits an offence under clauses (a), (b), and (c), ----

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cooperation and full implementation of the relevant international conventions relating to terrorism.

79 Amended by § 10 of the Anti-terrorism (Amendment) Act 2012.

80 Replaced by § 5 of the Anti-terrorism (Amendment) Act 2012. Unofficial English text.

he shall be deemed to have committed the offence of "terrorist activities".

(2) Any person committing terrorist activities shall be sentenced with death or with life imprisonment or with a rigorous imprisonment of not more than 20 years but not less than four years. Additionally, a fine may also be imposed against the convict.

The amending Act replaces section 7 of the original Act of 2009, which creates the offence of financing of terrorism. The new section 7 provides that:[81]

(1) If any person or entity knowingly supplies or intends to supply money, service, material support or any other property to other person and if there is reasonable cause to believe that those would be used or have been actually used, wholly or partly, for terrorist activities by any terror or terrorist group or organisation, he would be deemed to have committed the offence of financing terrorist activities.

(2) If any person knowingly receives money, service, material support or any other property, and if there is reasonable cause to believe that those would be used or have been actually used, wholly or partly, for terrorist activities by any terror or terrorist group or organisation, he would be deemed to have committed the offence of financing terrorist activities.

(3) If any person knowingly manages money, service, material support or any other property for the use by any other person or entity, and if there is reasonable cause to believe that those might be or have actually been used, wholly or partly, for terrorist activities by any terror or terrorist group or organisation, he would be deemed to have committed the offence of financing terrorist activities.

(4) If any person knowingly incites any other person to supply or receive any money, service, material support or any other property which are reasonably believed to be used or which have actually

81 Replaced by § 6 of the Anti-terrorism (Amendment) Act 2012.

been used, wholly or partly, for terrorist activities by any terror or terrorist group or organisation, he would be deemed to have committed the offence of financing terrorist activities.

(5) If any person is found guilty of offences under sub-sections (1) to (4), he shall, upon conviction, be punished with an imprisonment of not more than twenty years and not less than four years. In addition to imprisonment, the court may impose a fine of taka 10,000,000 or of an amount being the double of the value of property involved in the offence, whichever is greater.

(6) If any entity is found guilty of offences under sub-sections (1) to (4), actions may be taken against it under section 18, and a fine of taka 50,000,000 or of an amount being the triplex of the value of property involved in the offence, whichever is greater, may also be imposed against it. Further, the managers, chief executive, or the managing director of such organisation, shall be liable to be punished with an imprisonment of not more than twenty years and not less than four years. In addition to imprisonment, they may also be subjected to a fine of taka 20,000,000 or of an amount being the double of the value of property involved in the offence, whichever is greater.

The Act empowers the central bank to take necessary measures to prevent and suppress terrorist financing. The amended section 15 provides that,[82]

(1) In order to prevent an offence under this Act being committed, the Bangladesh Bank shall have powers to call for information/report from any reporting institution as to any suspect transaction, to send the report so received to any law-enforcing agency for action, to compile and preserve necessary statistics and data, to create a database for suspected transactions and to analyse these information, to direct the concerned reporting institution to restrict the operation of any account which is reasonably suspected to be engaged in terrorist financing, to inspect banks or any reporting institution with a view to detecting transactions involved in the financing of terrorism, and so on (sec. 15(1)).

82 Replaced by § 8 of the Anti-terrorism (Amendment) Act 2012.

(2) Bangladesh Bank will have to inform the law-enforcing agencies of the result of its detection of any institution or person that may have been involved in suspected transaction, and render its assistance for the investigation (sec. 15(2)).

(3) In case of an offence of terrorism occurred in a foreign country, the Bangladesh Bank initiate measures to freeze account of the concerned person or organisation in accordance with any bilateral, regional or international treaty or any UN convention or the Security Council resolutions (sec. 15(3)).

(4) The law-enforcing agency may, for the interest of investigating a charge of terrorist financing, gain access to any bank document or record with the approval of any competent court or upon the approval of the Bangladesh Bank (sec. 15(7)).

With a view to preventing terrorist financing, the amending Act of 2012 replaced sec. 16 of the original Act of 2009, to impose upon every reporting institution[83] an obligation (1) to report to the central bank, on their own motion, any suspected transaction, (2) to issue guidelines for its Board, or Directors, or the Chief Executive on ways to prevent such transactions involved in terrorist financing. Breach of this obligation or the supply, by any institution, of wrong or misleading information is subject to penalised by a fine of maximum taka 10,00,000 (sec. 16(3)). Additionally, the license of the recalcitrant institution or that of any of its branch/outlet may also be cancelled by the central bank/other licensing authority.

Amended section 20(1) (b) of the original Act of 2009,[84] mandates the Government to freeze the bank-accounts or any other account and to attach all property of any organisation prohibited as a terrorist entity.

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83 Reporting institutions are banks, non-banking financial institutions, insurance companies, money-exchangers, any company/institution dealing in the transferring or remittal of money, any other institution doing business with the approval of Bangladesh Bank. See *ibid*, § 2(20).

84 Replaced by § 12 of the Anti-terrorism (Amendment) Act 2012.

## INDONESIA

### INTERNATIONAL COOPERATION – RATIFICATION – COOPERATION IN COMBATTING TERRORISM IN THE ASEAN REGION

**Act No. 5 of 2012 on the Ratification of Convention on Counter Terrorism (Act 5/2012)**

Act 5/2012 aims to ratify the ASEAN Convention on Counter Terrorism. Terrorism is transnational organized crime and has resulted in loss of life regardless of the victim, causing widespread public fear, loss of independence, as well as property damage. The cooperation in security and counter terrorism in ASEAN is needed to establish the peace and dynamic stability in region. There is a need to do some efforts in countering terrorism through the regional cooperation. All of the principles contained in the ASEAN Convention on Counter-terrorism, among others, includes the view that terrorism cannot and should not be attributed to religion, nationality, civilization, or any ethnic group, respecting the sovereignty, equality, territorial integrity and national identity, not intervene affairs in the country, respecting the territorial jurisdiction, the existence of mutual legal assistance, extradition, and promoting the peaceful settlement of disputes. Moreover, it specifically contains the provisions regarding the rehabilitation program for terrorism suspects, fair and humane treatment and respect for human rights in the process of handling.[85]

## PHILIPPINES

### PENALIZATION OF FINANCING TERRORISM – RECOGNITION AND ADHERENCE TO INTERNATIONAL COMMITMENT COMBATTING FINANCING OF TERRORISM – EXTRA-TERRITORIAL APPLICATION – EXTRADITION

**An Act Defining the Crime of Financing of Terrorism, Providing Penalties Therefor and for Other Purposes**

Known as the "The Terrorism Financing Prevention and Suppression Act of 2012," Republic Act No. 10168 emphasizes the recognition and adherence

85 Indonesia, *Act No. 5 of 2012 on Ratification of ASEAN Convention on Counter-Terrorism, State Gazette of the Republic of Indonesia Year 2012 No. 93, Supplement to State Gazette of the Republic of Indonesia No. 5306*, Preamble, para 6.

of the Philippines to international commitments to combat the financing of terrorism, specifically to the International Convention for the Suppression of the Financing of Terrorism and other binding, terrorism-related resolutions of the UN Security Council pursuant to Chapter VII of the UN Charter (Sec. 2). The law essentially penalizes the financing of terrorism and related offenses. It was signed into law on 20 June 2012.

Terrorist acts are violations of certain sections of the Philippines' Human Security Act of 2007; any other act intended to cause death or serious bodily injury to a civilian, or to any other person "not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act;" and any act which constitutes an offense under The Terrorism Financing Prevention and Suppression Act of 2012 that is within the scope of any of the certain treaties to which the Philippines is a party. These treaties are the following: Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention against the Taking of Hostages; Convention on the Physical Protection of Nuclear Material; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; and International Convention for the Suppression of Terrorist Bombings [Sec. 3(j)].

A terrorist is a natural person who, among others, commits terrorist acts. This includes those who contribute to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act [Sec. 3(i)]. A terrorist organization, association or group of persons is defined also [Sec. 3(k)].

The crime of financing of terrorism is committed by any person who, directly or indirectly, willfully and without lawful excuse, possesses, pro-

vides, collects or uses property or funds or makes available property, funds or financial service or other related services, by any means, with the unlawful and willful intention that they should be used or with the knowledge that they are to be used, in full or in part: (a) to carry out or facilitate the commission of any terrorist act; (b) by a terrorist organization, association or group; or (c) by an individual terrorist (Sec. 4). Attempt or conspiracy to finance terrorism and deal with property or funds of designated persons is criminalized (Sec. 5).

The law states that the Philippines' Anti-Money Laundering Council, consistent with international obligations, shall be authorized to issue a freeze order with respect to property or funds of a designated organization, association, group or any individual to comply with binding terrorism-related Resolutions, including Resolution No. 1373, of the UN Security Council pursuant to Article 41 of the UN Charter. The order shall be effective until the basis for the issuance thereof shall have been lifted. However, if the property or funds subject of the order are found to be in any way related to financing of terrorism or acts of terrorism committed within the jurisdiction of the Philippines, they shall be the subject of civil forfeiture proceedings. (Sec. 11)

Notably, on certain cases, the law is given extra-territorial application, subject to the provision of an existing treaty, including the International Convention for the Suppression of the Financing of Terrorism of which the Philippines is a party, and to any contrary provision of any law of preferential application. In the case of an alien whose extradition is requested pursuant to the International Convention for the Suppression of the Financing of Terrorism, and that alien is not extradited to the requesting State, the Philippines, shall submit the case without undue delay to the Department of Justice for the purpose of prosecution in the same manner as if the act constituting the offense had been committed in the Philippines. Philippine courts shall have jurisdiction over the offense. (Sec. 19)

# Treaties

## INDIA

### TAXATION OF OFFSHORE CAPITAL GAINS AND THE INDIAN INCOME-TAX ACT – GLOBAL CORPORATE STRUCTURES AND TAX AVOIDANCE MEASURES – DOUBLE TAXATION TREATIES – FOREIGN DIRECT INVESTMENT AND INVESTMENT TREATIES

***Vodafone International Holdings B.V. v. Union of India and Another*** **[Supreme Court of India, 20 January 2012 http://JUDIS.NIC.IN]**

*Facts*

This case is related to the taxation of offshore capital gains. Besides that, the case also provided a window for the existence of a complex corporate share structure at the global level and its transfer to various holding companies located in different jurisdictions. The Court provided the summary of the facts involved in the opening paragraph. The matter concerned a tax dispute involving the Vodafone Group with the Indian Tax Authorities in relation to the acquisition by Vodafone International Holdings (VIH), a company resident for tax purposes in the Netherlands, of the entire share capital of CGP Investments (Holdings) Ltd. (CGP), a company resident for tax purposes in the Cayman Islands vide transaction dated 11.02.2007, whose stated aim, according to the Revenue, was "acquisition of 67% controlling interest in Hutchison Essar Limited (HEL), being a company resident for tax purposes in India." This was disputed by the appellant VIH stating that VIH agreed to acquire companies which in turn controlled a 67% interest, but not controlling interest, in Hutchison Essar Limited. According to the appellant, CGP held indirectly through other companies' 52% shareholding interest in HEL as well as Options to acquire a further 15% shareholding interest in HEL, subject to relaxation of FDI norms. In short, the Indian tax authorities sought to tax the capital gains arising from the sale of the share capital of CGP on the basis that CGP, whilst not a tax resident in India, held the underlying Indian assets.

While the above paragraph provides a brief set of facts leading the taxing of an offshore transaction, the first few paragraphs of the Court verdict explained the complex internal and global corporate structure of the companies involved and the transactions undertaken. The Court had to

decide as to how in certain circumstances tax avoidance measures should be identified and brought under the tax net. While considering this issue, the Court examined the arguments put forward with regard two important cases, namely *Union of India v. Azadi Bachao Andolan* (2004) 10 SCC 1 and the *McDowell and Co. Ltd. v. CTO* (1985) 3 SCC 230. The Court pointed out:

> Before coming to Indo-Mauritius DTAA, we need to clear the doubts raised on behalf of the Revenue regarding the correctness of Azadi Bachao (supra) for the simple reason that certain tests laid down in the judgments of the English Courts subsequent to the *Commissioners of Inland Revenue v. His Grace the Duke of Westminster* 1935 All E.R. 259 and *W.T. Ramsay Ltd. v. Inland Revenue Commissioners* (1981) 1 All E.R. 865 help us to understand the scope of Indo-Mauritius DTAA. It needs to be clarified, that, McDowell dealt with two aspects. First, regarding validity of the Circular(s) issued by CBDT concerning Indo-Mauritius DTAA. Second, on concept of tax avoidance/evasion. Before us, arguments were advanced on behalf of the Revenue only regarding the second aspect.

The Court referred to several English cases (two of them as quoted in the above) and to the Westminster Principle which stated that "given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance." The Court also noted that this principle had been reiterated in subsequent English Court judgments as "cardinal principle."[86]

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86 Ramsay was a case of sale-lease back transaction in which gain was sought to be counteracted, so as to avoid tax, by establishing an allowable loss. The method chosen was to buy from a company a readymade scheme, whose object was to create a neutral situation. The decreasing asset was to be sold so as to create an artificial loss and the increasing asset was to yield a gain which would be exempt from tax. The Crown challenged the whole scheme saying that it was an artificial scheme and, therefore, fiscally ineffective. It was held that Westminster did not compel the court to look at a document or a transaction, isolated from the context to which it properly belonged. It is the task of the Court to ascertain the legal nature of the transaction, and, while doing so, it has to look at the entire transaction as a whole and not to adopt a dissecting approach. In the present case, the Revenue has adopted a dissecting approach at the Department level 61. Ramsay did not discard Westminster but read it in the proper context by "device" which was colorable in nature had to be ignored as fiscal nullity. Thus, Ramsay laid down the principle of statutory interpretation rather than an over-arching

The Court referred to what has been termed as "separate entity principle" and noted that the approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally was founded on this principle i.e., to treat a company as a separate person. The Court noted

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anti-avoidance doctrine imposed upon tax laws. *Furniss (Inspector of Taxes) v. Dawson* (1984) 1 All E.R. 530 dealt with the case of interpositioning of a company to evade tax. On facts, it was held that the inserted step had no business purpose, except deferment of tax although it had a business effect. *Dawson* went beyond Ramsay. It reconstructed the transaction not on some fancied principle that anything done to defer the tax be ignored but on the premise that the inserted transaction did not constitute "disposal" under the relevant Finance Act. Thus, *Dawson* is an extension of Ramsay principle. After *Dawson*, which empowered the Revenue to restructure the transaction in certain circumstances, the Revenue started rejecting every case of strategic investment/tax planning undertaken years before the event saying that the insertion of the entity was effected with the sole intention of tax avoidance. In *Craven (Inspector of Taxes) v. White (Stephen)* (1988) 3 All. E.R. 495, it was held that the Revenue cannot start with the question as to whether the transaction was a tax deferment/saving device but that the Revenue should apply the look at test to ascertain its true legal nature. It observed that genuine strategic planning had not been abandoned. The majority judgment in *McDowell* held that "tax planning may be legitimate provided it is within the framework of law" (para. 45). In the latter part of para. 45, it held that "colorable device cannot be a part of tax planning[,] and it is wrong to encourage the belief that it is honorable to avoid payment of tax by resorting to dubious methods." It is the obligation of every citizen to pay the taxes without resorting to subterfuges. The above observations should be read with para. 46 where the majority holds "on this aspect one of us, Chinnappa Reddy, J. has proposed a separate opinion with which we agree." The words "this aspect" express the majority's agreement with the judgment of Reddy, J. only in relation to tax evasion through the use of colorable devices and by resorting to dubious methods and subterfuges. Thus, it cannot be said that all tax planning is illegal/illegitimate/impermissible. Moreover, Reddy, J. himself says that he agrees with the majority. In the judgment of Reddy, J., there are repeated references to schemes and devices in contradistinction to "legitimate avoidance of tax liability" (paras. 7-10, 17 & 18). In our view, although Chinnappa Reddy, J. makes a number of observations regarding the need to depart from the "Westminster" and tax avoidance, these are clearly only in the context of artificial and colorable devices. Reading *McDowell*, in the manner indicated hereinabove, in cases of treaty shopping and/or tax avoidance, there is no conflict between *McDowell* and *Azadi Bachao* or between *McDowell* and *Mathuram Agrawal*.

that the Indian Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income-tax.[87]

The Court noted and accepted that the group parent company could be involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. The Court, however, also noted that "the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides." While referring to separate existence of different companies that are part of the same group, the Court noted:

> It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e., without a foreign holding or operating company) of an equity interest in a foreign invested Indian company. However, taxation of such Holding Structures very often gives rise to issues such as double taxation, tax deferrals and tax avoidance. In this case, we are concerned with the concept of GAAR. In this case, we are not concerned with treaty-shopping but with the anti-avoidance rules.

While noting that the concept of GAAR was not new to India since it already had a judicial anti-avoidance rule, like some other jurisdictions, lack of clarity and absence of appropriate provisions in the statute and/or

87 Companies and other entities are viewed as economic entities with legal independence vis-a-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers. Consequently, the entities subject to income-tax are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence, and regardless of whether profits are reserved or distributed to the shareholders/ participants. Furthermore, shareholders/ participants that are subject to (personal or corporate) income-tax are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Now a days, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct tax payers.

in the treaty regarding the circumstances, in which judicial anti-avoidance rules would apply, had generated litigation in India.

Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/Courts should keep in mind the following factors: the concept of participation in investment; the duration of time during which the Holding Structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; and the continuity of business on such exit. In short, the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colorable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device.

The Court did not concur with the conclusions of the High Court of Bombay in applying the "nature and character of the transaction" test. The High Court had noted that besides transferring shares, there was also transaction of transfer of other `rights and entitlements' which constituted themselves "capital assets" within the relevant provisions of the Indian Income Tax Act. While disagreeing with this view, the Court stated:

> This case concerns "a share sale" and not an asset sale. It concerns sale of an entire investment. A "sale" may take various forms. Accordingly, tax consequences will vary. The tax consequences of a share sale would be different from the tax consequences of an asset sale. A slump sale would involve tax consequences which could be different from the tax consequences of sale of assets on itemized basis. "Control" is a mixed question of law and fact. Ownership of shares may, in certain situations, result in the assumption of an interest which has the character of a controlling interest in the management of the company. A controlling interest is an incident of ownership of shares in a company, something which flows out of the holding of shares. A controlling interest is, therefore, not an identifiable or distinct capital asset independent of the holding of shares. The control of a company resides in the voting power of its shareholders and shares represent an interest of a shareholder which is made up of various rights contained in the contract embedded in the Articles of Association. The right of a shareholder may assume the character of a controlling interest where the extent of the

> shareholding enables the shareholder to control the management. Shares, and the rights which emanate from them, flow together and cannot be dissected.

***Decision***

The Supreme Court did not agree with the rationale of the High Court of Bombay regarding the nature of the transaction. According to the Court, the case dealt with "share sale," not "asset sale." The Court further noted that the case did not involve sale of assets on itemized basis. The Court felt that the High Court "ought to have applied the look at test . . . holistically."

The Court, applying the look at test in order to ascertain the true nature and character of the transaction, held that "the Offshore Transaction here in is a bona fide structured FDI investment into India which fell outside India's territorial tax jurisdiction, hence not taxable." The said Offshore Transaction, the Court noted, evidenced participative investment and not a sham or tax avoidant preordained transaction. The Court held that:

> The said Offshore Transaction was between HTIL (a Cayman Islands company) and VIH (a company incorporated in Netherlands). The subject matter of the Transaction was the transfer of the CGP (a company incorporated in Cayman Islands). Consequently, the Indian Tax Authority had no territorial tax jurisdiction to tax the said Offshore Transaction.

***Separate Opinion***

In his separate opinion, K. S. Radhakrishnan, J. noted that the question involved in this case was of considerable importance, especially on Foreign Direct Investment (FDI), which was indispensable for a growing economy like India.[88] Mapping the global FDI regime and its impact on India, the Court further noted:

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88 He also noted, "Foreign investments in India are generally routed through Offshore Finance Centres (OFC) also through the countries with whom India has entered into treaties. Overseas investments in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognized as important avenues of global business in India. Potential users of off-shore finance are: international companies, individuals, investors, and others and capital flows through FDI, Portfolio Debt Investment, Foreign Portfolio Equity Investment, and so on. Demand for off-shore

> Several international organizations like UN, FATF, OECD, Council of Europe and the European Union offer finance, one way or the other, for setting up companies all over the world. Many countries have entered into treaties with several offshore companies for cross-border investments for mutual benefits. India has also entered into treaties with several countries for bilateral trade which has been statutorily recognized in this country. United Nations Conference on Trade and Development (UNCTAD) Report on World Investment prospects survey 2009-11 states that India would continue to remain among the top five attractive destinations for foreign investors during the next two years.

Referring to various methods of cross-border FDI schemes, the Court sought to point out how these aspects needed to be reconciled with the Indian laws. The Court noted, thus:

> Merger, Amalgamation, Acquisition, Joint Venture, Takeovers and Slump-sale of assets are few methods of cross-border re-organizations. Under the FDI Scheme, investment can be made by availing the benefit of treaties, or through tax havens by non-residents in the share/convertible debentures/preference shares of an Indian company but the question which looms large is whether our Company Law, Tax Laws and Regulatory Laws have been updated so that there can be greater scrutiny of non-resident enterprises, ranging from foreign contractors and service providers, to finance investors. Case in hand is an eye-opener of what we lack in our regulatory laws and what measures we have to take to meet the various unprecedented situations, that too without sacrificing national interest. Certainty in law in dealing with such cross-border investment issues is of prime importance, which has been felt by many countries around the world and some have taken adequate regulatory measures so that investors can arrange their affairs fruitfully and effectively. Steps taken by various countries to meet such situations may also guide us, a brief reference of which is being made in the later part of this judgment.

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facilities has considerably increased owing to high growth rates of cross-border investments, and a number of rich global investors have come forward to use high technology and communication infrastructures. Removal of barriers to cross-border trade, the liberalization of financial markets, and new communication technologies has had positive effects on global economic growth, and India has also been greatly benefited."

While noting that the concerned case-related cross-border investment and legal issues emanated from that, the Radhakrishan J. agreed with facts that had been already elaborately dealt with. However, while concurring with all major issues, he felt that reference to few facts would be necessary to address and answer certain core issues that had been raised. The High Court of Bombay had held, after elaborating upon the maze of facts relating to investments made by various holding companies, that transaction between Hutch and Vodafone in transferring "controlling interest" in India as taxable under its relevant laws.

The Court noted that corporate structure was primarily created for business and commercial purposes and multi-national companies who make offshore investments always aim at better returns to the shareholders and the progress of their companies.[89] The Revenue/Courts, the Court pointed out, could always examine whether those corporate structures are genuine and set up legally for sound and veritable commercial purposes.[90] The Court further pointed out:

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89 The Court pointed out, "Corporate structure created for genuine business purposes are those which are generally created or acquired: at the time when investment is being made; or further investments are being made; or the time when the Group is undergoing financial or other overall restructuring; or when operations, such as consolidation, are carried out, to clean defused or over-diversified. Sound commercial reasons like hedging business risk, hedging political risk, mobility of investment, ability to raise loans from diverse investments, often underlie creation of such structures. In transnational investments, the use of a tax neutral and investor-friendly countries to establish SPV is motivated by the need to create a tax efficient structure to eliminate double taxation wherever possible and also plan their activities attracting no or lesser tax so as to give maximum benefit to the investors. Certain countries are exempted from capital gain, certain countries are partially exempted and, in certain countries, there is nil tax on capital gains. Such factors may go in creating a corporate structure and also restructuring."

90 While noting that some of these companies involve in manipulation of the market, money laundering and other related activities, the Court referred to a 1998 report prepared by the Organization of Economic Co-operation and Development (OECD) called "Harmful Tax Competition: An Emerging Global Issue." This report was about doing away with tax havens and offshore financial centers, like the Cayman Islands, on the basis that their low-tax regimes provide them with an unfair advantage in the global market place and were, thus, harmful to the economics of more developed countries.

> Overseas companies are companies incorporated outside India and neither the Companies Act nor the Income Tax Act enacted in India has any control over those companies established overseas and they are governed by the laws in the countries where they are established. From country to country laws governing incorporation, management, control, taxation etc. may change. Many developed and wealthy Nations may park their capital in such off-shore companies to carry on business operations in other countries in the world. Many countries give facilities for establishing companies in their jurisdiction with minimum control and maximum freedom. Competition is also there among various countries for setting up such offshore companies in their jurisdiction. Demand for offshore facilities has considerably increased, in recent times, owing to high growth rates of cross-border investments and to the increased number of rich investors who are prepared to use high technology and communication infrastructures to go offshore. Removal of barriers to cross-border trade, the liberalization of financial markets and new communication technologies has had positive effects on the developing countries including India.

The Court surveyed various legislative measures taken by India to regulate offshore tax evasion. Specific reference was made to India-Maurtius Double Taxation Treaty and the legal principles that had been evolved in the *Azadi Bachao Andolan* case decided by the Supreme Court.

After considering various provisions of the Indian tax laws, particularly Section 195 of the Indian Income Tax Act, 1961 relating to offshore transactions, Radhakrishan, J. concurred and held that he did not agree with the conclusions that the sale of CGP share by HTIL to Vodafone would amount to transfer of a capital asset within the meaning of Section 2 (14) of the Indian Income Tax Act.

## NATIONAL AND INTERNATIONAL LEGAL REGIMES RELATING TO HAZARDOUS/TOXIC WASTES – CONFORMITY OF INDIAN LAWS WITH BASEL CONVENTION AND MARPOL CONVENTION

### *Research Foundation for Science Technology and Natural Resource v. Union of India and Others* [Supreme Court of India, 6 July 2012 http://JUDIS.NIC.IN]

*Facts*

Research Foundation for Science Technology and Natural Resource Policy, a civil society organization, filed a writ petition before the Supreme Court seeking to ban imports of all hazardous/toxic wastes. It also sought a direction to amend the rules relating to hazardous and toxic wastes in conformity with the BASEL Convention and Article 21, 47, and 48A of the Constitution. The petition also sought to declare that without adequate protection to the workers and public and without any provision of sound environment management of disposal of hazardous/toxic wastes, the Hazardous Wastes (Management & Handling) Rules, 1989 (HWMH rules, 1989) violates fundamental rights, and therefore, is unconstitutional. Importation of toxic wastes from industrialized countries to India under the cover of recycling was also challenged as violating Articles 14 and 21 of the Indian Constitution. (It also violates Article 47 which enjoins a duty on the State to raise the standards of living and improve public health and Article 48A which provides that the State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country).

The petition also referred to the tragedies that had occurred on account of either dumping or releasing of hazardous and toxic wastes into the environment such as the Union Carbide factory at Bhopal in 1984. The petition also referred to the context in which Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted under the auspices of the United Nations Environment Programme (UNEP), which had convened a Conference on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes pursuant to the decision adopted by the Governing Council of UNEP on 17th June 1987. This Conference was held at the European World Trade and Convention Centre, Basel. The petition noted that the Basel Convention was adopted on March 22, 1989, and India signed the Convention on Sep-

tember 22, 1992. The petitioner contended that India should have enacted the laws or amended the existing regulatory framework regarding to the transboundary movement procedures of hazardous wastes.

The petition outlined the salient features of the Basel Convention: (a) inform other parties about its decision to prohibit the import of hazardous wastes or other wastes for disposal (Article 13); (b) when notified about this prohibition, other parties should not permit exportation of hazardous wastes and other wastes to that party; (c) prohibit exportation of hazardous wastes and other wastes if there is no written consent of the importing State to that specific importation; (d) prepare steps to prevent pollution due to hazardous wastes affecting human health and the environment.

One of the main concerns of the petitioners was that Asia was fast becoming a vast dumping ground for international waste traders under the garb of recycling. Petitioner also drew the attention of the Court to the provisions of the HWMH Rules, 1989 and complained that the same had not been implemented by the Central Government, the State Governments, and Union Territories and their respective Pollution Control Boards. Pursuant to this, the Court asked all the relevant State Governments and Union Territories and the respective Pollution Control Boards to submit a report (affidavit) stating the status of implementation.

*Judgment*

The Court, after considering the reports and finding it unsatisfactory, decided to appoint a High-Powered Committee with 14 issues as terms of reference. These issues related to the various aspects of implementation of Basel Convention within India. The issues were, briefly, (a) to what extent hazardous wastes listed in the Basel Convention had been banned by the Government; (b) to present the status of recycling imported and indigenous hazardous wastes; (c) to determine the status of implementation of the HWMH Rules, 1989 by various State and other entities; (d) to safeguard in place to ensure that banned toxic/hazardous wastes would not be imported; (e) make changes required in the existing laws to regulate the functioning of units handling hazardous wastes and protect the people (including workers in the factory) from environmental hazards; (f) to assess the existing facilities for disposal of hazardous wastes; (g) what needs to be done further to regulate the existing body of laws; (h) to make recommendations for issuance of authorization/permission under provi-

sions of HWMH Rules, 1989; (i) to identify criteria for designating areas for locating units handling hazardous wastes and waste disposal sites; (j) to examine the effectiveness of State Boards in handling hazardous wastes in accordance with HWMH Rules, 1989; (k) to recommend a mechanism for publication of inventory giving area-wise information about level and nature of hazardous wastes; (l) to identify a framework of reducing risks to environment and public health by promoting production methods and products, which are ecologically friendly, and thus, reduce the production of toxics; (m) to examine quantum and nature of hazardous wastes lying at the docks/ports/ICDs, and recommend a mechanism for its safe disposal or re-export to the original exporters; and (n) to decontaminate ships before they are exported to India for breaking.

This High-Powered Committee submitted its report after making thorough examination of all matters relating to hazardous wastes. The Court considered this report in October 2003 and laid emphasis on two issues: (a) relating to imported waste oil lying in the ports and docks; and (b) ship breaking. The Court noted that the ship breaking operations could not be allowed to continue without strictly adhering to all precautionary principles. The Court was concerned about the illegal imports of waste oil lying in the ports and docks. It constituted an eight-member Committee to deal with this issue and act against such illegal importers under the relevant laws that included Customs Act, 1962 and Central Excise Act, 1944. Further, the Court also had to deal with issues of large scale oil wastes located in ports and docks with their importers untraceable. In order to deal with that, it constituted a Monitoring Committee comprising experts suggested by the Ministry of Environment and Forests. While dealing with this issue, the Court considered the requirements under the MARPOL Convention, which was mandatory for signatory States to allow discharge of sludge oil for the purposes of recycling. The Court noted that:

> The original MARPOL Convention was signed on 17th February, 1973, but did not come into force. Subsequently, in combination with the 1978 Protocol, the Convention was brought into force on 2nd October, 1983. As will be noticed from the acronym, the expression "MARPOL" is the short form of "Marine Pollution." The same was signed with the intention of minimizing pollution on the seas, which included dumping, oil and exhaust pollution. Its object was to preserve the marine environment through the complete elimination of pollution by oil and other harmful substances and

> the minimization of accidental discharge of such substances. As far as this aspect of the matter is concerned, the Central Government was directed to file an affidavit indicating in detail how the said oil was dealt with. The issue relating to the import of such sludge oil was left unresolved for decision at a subsequent stage.

While hearing the case, the court examined at length "two dominating principles relating to pollution namely, the polluter-pays principle and precautionary principle." Based on this, the Court gave several directions. The Court, taking into account the reports of the Monitoring Committee, gave directions (from 2003 to 2005) to destroy or recycle hazardous wastes which were identified at various sites such as ports and other places. The Court also noted that a detailed analysis and consideration of the proper implementation of the Basel Convention and MARPOL Convention within India were still pending as mentioned in the prayers of the petitioners (referring to Basel Convention and Articles 21, 47, and 48 A of the Constitution and also amendment of the HWMH Rules, 1989 to provide adequate protection to workers and public). It also noted that the proceedings before the Court became a continuing mandamus, and it from time to time took up several issues emanating from the first prayer in the writ petition to ban imports of all hazardous/toxic wastes. The Court also noted that one of the Conventions, namely, the impact of the MARPOL Convention, though referred to, was not decided and left for decision at the final hearing. The Court referred to the history, evolution, and salient features of the MARPOL Convention. It stated, thus:

> The MARPOL Convention, normally referred to as "MARPOL 73/78", may be traced to its beginnings in 1954, when the first conference was held and an International Convention was adopted for the Prevention of Pollution of Sea by Oil (OILPOL). The same came into force on 26th July, 1958 and attempted to tackle the problem of pollution of the seas by oil, such as, (a) crude oil; (b) fuel oil; (c) heavy diesel oil; and (d) lubricating oil. The first Convention was amended subsequently in 1962, 1969 and 1971, limiting the quantities of oil discharge into the sea by Oil Tankers and also the oily wastes from use in the machinery of the vessel. Prohibited zones were established extending the setting up of earmarked areas in which oil could be discharged, extending at least 50 miles from the nearest land. In 1971, reminders were issued to protect the Great Barrier Reef of Australia. 1973 saw the adoption of the International Convention for the Prevention of Pollution from Ships. The said

> Convention, commonly referred to as MARPOL, was adopted on 2nd November, 1973, at the International Marine Organization and covered pollution by: (i) oil; (ii) chemicals; (iii) harmful substances in packaged form; (iv) sewage; and (v) garbage Subsequently, the 1978 MARPOL Protocol was adopted at a Conference on Tanker Safety and Pollution Prevention in February, 1978.

The overall objective of the MARPOL Convention was to completely eliminate pollution of the marine environment by discharge of oil and other hazardous substances from ships, and to minimize such discharges in connection with accidents involving ships. The MARPOL 73/78 Convention has six Annexures containing detailed regulations regarding permissible discharges, equipment on board ships, etc. They are as follows: Annex I: Regulations for the Prevention of Pollution by Oil, 2 October, 1983; Annex II: Regulations for the Control of Pollution by Noxious Liquid Substances (Chemicals) in Bulk, 6 April, 1987; Annex III: Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form, 1 July 1992; Annex IV: Regulations for the Prevention of Pollution by Sewage from ships, 27 September 2003; Annex V: Regulations for the Prevention of Pollution by Garbage from Ships, 31 December 1988; and Annex VI: Regulations for the Prevention of Air Pollution from Ships and Nitrogen oxide. The MARPOL 73/78 Convention will enter into force on 19 May 2005.

Apart from the said Regulations, the MARPOL Convention also contains various Regulations with regard to inspection of ships in order to ensure due compliance with the requirements of the Convention. The Court further noted,

> India is a signatory, both to the Basel Convention as also the MARPOL Convention, and is, therefore, under an obligation to ensure that the same are duly implemented in relation to import of hazardous wastes into the country. As we have noticed earlier, the Basel Convention prohibited the import of certain hazardous substances on which there was a total ban. However, some of the other pollutants, which have been identified, are yet to be notified and, on the other hand, in order to prevent pollution of the seas, under the MARPOL Convention the signatory countries are under an obligation to accept the discharge of oil wastes from ships. What is, therefore, important is for the concerned authorities to ensure that such waste oil is not allowed to contaminate the surrounding areas and also, if suitable, for the purposes of recycling, to allow

recycling of the same under strict supervision with entrusted units and, thereafter, to oversee its distribution for reuse.

***Decision***

Recalling its earlier orders and two constituted Committees to analyze and monitor the quantum and handling of hazardous and other wastes during last 15 years of the proceedings (which also brought to focus contamination risks involved in ship breaking), the Court directed the Central Government to ban import of all hazardous/toxic wastes which had been identified and declared to be so under the Basel Convention and its different protocols. The Court also directed the Central Government to bring the HWMH Rules, 1989 in line with Basel Convention and Articles 21, 47, and 48A of the Constitution.

## PHILIPPINES

### INTERPRETATION OF TREATIES – AIR TRANSPORT AGREEMENTS – TAX EXEMPTIONS

***Silkair (Singapore) Pte. Ltd. v. Commissioner of Internal Revenue*** **[G.R. No. 166482. 25 January 2012]**

Silkair (Singapore) Pte. Ltd. is a foreign corporation duly licensed to do business in the Philippines as an on-line international carrier operating the Cebu-Singapore-Cebu and Davao-Singapore-Davao routes. In the course of its international flight operations, it purchased aviation fuel from Petron Corporation (Petron) in 1998, paying the excise taxes thereon in the sum of PhP5,007,043.39. The payment was advanced by Singapore Airlines, Ltd. In 1999, Silkair filed an administrative claim for refund representing excise taxes on the purchase of jet fuel from Petron, which it alleged to have been erroneously paid.

While the claim was based on the 1997 Tax Code, Silkaair also invoked Article 4(2) of the Air Transport Agreement between the Government of the Republic of the Philippines and the Government of the Republic of Singapore (Air Transport Agreement between RP and Singapore). It provides the reciprocal enjoyment of the privilege of the designated airline of the contracting parties –

> ART. 4
>
> 2. Fuel, lubricants, spare parts, regular equipment and aircraft stores introduced into, or taken on board aircraft in the territory of one Contracting Party by, or on behalf of, a designated airline of the other Contracting Party and intended solely for use in the operation of the agreed services shall, with the exception of charges corresponding to the service performed, be exempt from the same customs duties, inspection fees and other duties or taxes imposed in the territory of the first Contracting Party, even when these supplies are to be used on the parts of the journey performed over the territory of the Contracting Party in which they are introduced into or taken on board. The materials referred to above may be required to be kept under customs supervision and control.

The lower courts denied the claim for tax refund. In this appeal, Silkair argues that it is the proper party to file the claim for refund, being the entity granted the tax exemption under the Air Transport Agreement between the Philippines and Singapore. It disagrees with the reasoning that since an excise tax is an indirect tax, it is the direct liability of the manufacturer, Petron, because this puts to naught whatever exemption was granted to petitioner by Article 4 of the Air Transport Agreement.

The Supreme Court, however, sustained the denial. The core legal issue is the legal personality of Silkair to file an administrative claim for refund of excise taxes. In three previous cases involving the same parties, the Court said that it has already settled the issue of whether Silkair is the proper party to seek the refund. Excise taxes are basically an indirect tax. While the tax is directly levied upon the manufacturer/importer upon removal of the taxable goods from its place of production or from the customs custody, the tax, in reality, is actually passed on to the end consumer as part of the transfer value or selling price of the goods, sold, bartered or exchanged. The proper party to question or seek a refund of the tax is the statutory taxpayer. The contention that the ruling would put to naught the exemption granted under the 1997 Tax Code and Article 4 of the Air Transport Agreement is not well-taken. Since the supplier herein involved is also Petron, Silkair must submit a valid exemption certificate for the purpose. It is premature for it to assert that the denial of its claim for tax refund nullifies the tax exemption granted to it under the 1997 Tax Code and Article 4 of the Air Transport Agreement.

## TREATIES AND CONVENTIONS

In 2012, the Senate of the Philippines has concurred with several important agreements that involve the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Center for Living Aquatic Resources Management; mutual legal assistance in criminal matters; consular matters; social security; visiting forces; and the International Labor Organization (ILO).

### AGREEMENTS CONCURRED BY THE PHILIPPINE SENATE IN 2012 – GENEVA CONVENTIONS – INTERNATIONAL HUMANITARIAN LAW – PROTOCOL ADDITIONAL TO THE GENEVA CONVENTION OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I)

**Philippine Senate Resolution No. 77, 6 March 2012**

The Philippines has been a party to the Four Geneva Conventions of 12 August 1949 since 6 October 1952, to Additional Protocol II and to Additional Protocol III of the Conventions since 11 December 1986 and 22 August 2006, respectively. In 1977, the Philippines signed Protocol I, but it remained one of the few States which had yet to ratify it.

According to the Senate resolution, the Philippine President ratified the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) on 23 December 2010 and submitted it to the Senate for concurrence with the understanding that: (1) The application of Protocol I shall not affect the legal status of the Parties to the conflict and the concerned territory (no claim of status of belligerency may be invoked from it); (2) It may in no case be invoked in internal armed conflicts within sovereign States; and (3) The terms "armed conflict" and "conflict" do not include the commission of ordinary crimes.

### AGREEMENTS CONCURRED BY THE PHILIPPINE SENATE IN 2012 – GENEVA CONVENTIONS – INTERNATIONAL HUMANITARIAN LAW – OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

**Philippine Senate Resolution No. 78, 6 March 2012**

The Philippines became is a State Party to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, having ratified it on 18 June 1986.

The Senate resolution states that the Optional Protocol to the Convention places emphasis on preventing violations and introduces a new system of monitoring compliance to the Convention by establishing mechanisms that would enable regular and periodic visits to places of detention. It would also enable States Parties to benefit from the assistance that the international mechanism will offer, including advisory, technical and financial assistance. As a backgrounder, the resolution relates that the country is also a party to the International Covenant on Civil and Political Rights which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

### LIVING AQUATIC RESOURCES – AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE INTERNATIONAL CENTER FOR LIVING AQUATIC RESOURCES MANAGEMENT

**Philippine Senate Resolution No. 79, 6 March 2012**

The Government of the Republic of the Philippines and the International Center for Living Aquatic Resources Management (ICLARM) signed an agreement on 22 April 2008, which provides for the establishment of the WorldFish Center Office in the Philippines. The Office would primarily undertake activities for research and development of aquatic and maritime resources in the Philippines and nearby regions. It could enter into contracts, acquire/dispose properties, receive gifts and donations, hold funds, and conduct research, training and other programs in line with its mandate.

The resolution opines that the establishment of the Center brings potential for the Philippines to meet the Millennium Development Goals on poverty reduction and hunger elimination, among others. The agreement

states that the Office shall enjoy immunities and privileges accorded to an international organization of a universal character. This includes immunity from penal, civil, and administrative proceedings and exemption from customs, visa and immigration requirements.

### MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS – TREATY ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

**Philippine Senate Resolution No. 81, 8 May 2012**

The treaty on mutual legal assistance in criminal matters between the Philippines and the United Kingdom was signed on 18 September 2009 in London. The Philippine President ratified it on 12 July 2011 and accordingly submitted it to the Senate for concurrence.

The Senate resolution provides that the treaty seeks to establish effective measures of cooperation in the investigation, prosecution, and suppression of criminal offenses and in proceedings related to criminal matters. It prescribes a legal framework for mutual assistance in accord with the UN Convention against Corruption and the Convention for the Suppression and Financing of Terrorism. Assistance made possible under the treaty includes taking of testimony of witnesses, provision of documents and items of evidence, exchange of criminal records, execution of searches and seizures, location and identification of witnesses, tracing and confiscation of the proceeds of crimes, and freezing of assets.

### MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS – TREATY BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE PEOPLE'S REPUBLIC OF CHINA CONCERNING MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

**Philippine Senate Resolution No. 83, 8 May 2012**

In Beijing, on 16 October 2000, the treaty between the Philippines and China was signed by both parties. The concurring Philippine Senate resolution states that it aims to improve cooperation between the parties in respect of mutual legal assistance in criminal matters on the basis of mutual respect for sovereignty, equality and mutual benefit.

The treaty seeks to provide a legal framework for mutual assistance in the investigation, and prosecution of criminal offenses and in proceedings related to criminal matters in accord with the UN Convention against Corruption and the Convention for the Suppression and Financing of Terrorism. Assistance made possible under the treaty includes taking of testimony of witnesses, provision of documents and items of evidence, exchange of criminal records, execution of searches and seizures, location and identification of witnesses, tracing and confiscation of the proceeds of crimes, and freezing of assets. It does not apply, however, to the extradition of any person and the execution of criminal judgments, verdicts or decisions permitted by the laws of the requested party and the treaty.

## SOCIAL SECURITY – CONVENTION ON SOCIAL SECURITY BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE KINGDOM OF SPAIN

### Philippine Senate Resolution No. 87, 15 May 2012

The new Convention on Social Security was signed in Manila on 12 November 2002. It amended and superseded the original Convention on Social Security which was signed in 1988 and came into force a year later. It sought to expand the protection afforded by the original treaty to Filipino workers, according to the Senate resolution, by extending the reach to a broader segment of the working population, augmenting economic benefits, and clarifying the procedure in computing the regulatory base of benefits vis-à-vis insurance periods. It applies to workers who are nationals of either Spain or the Philippines, and to workers who are refugees in conformity with the 1951 UN Refugee Convention and its 1967 Protocol, and stateless persons in accordance with the 1954 UN Statelessness Convention, who reside in the territories of either parties, as well as their family members and other beneficiaries entitled to the benefits.

The new treaty also covers public sector workers contributing to the Philippines' Government Service Insurance System in addition to the originally covered private sector workers contributing to the Philippines' Social Security System with respect to economic benefits. It retains important provisions of the original treaty on equality of treatment, export of benefits, totalization, payment of benefits, and mutual administrative assistance. The Philippine President ratified it on 6 September 2011.

## VISITING FORCES – AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF AUSTRALIA CONCERNING THE STATUS OF VISITING FORCES OF EACH STATE IN THE TERRITORY OF THE OTHER STATE

**Philippine Senate Resolution No. 100, 24 July 2012**

The Philippines and Australia signed the Agreement between the Government of the Republic of the Philippines and the Government of Australia Concerning the Status of Visiting Forces of Each State in the Territory of the Other State (SOVFA) on 31 May 2007 in Canberra in order to further strengthen their defense cooperation activities.

The agreement aims to provide a framework to govern the status of the Armed Forces of the Philippines and the Australian Defense Forces personnel who participate in the education, training, combined exercises, and humanitarian activities in each other's territories as part of the parties' broad and deep cooperation in the area of defense and security. The Senate resolution clarifies that the agreement is not a basing agreement since it merely provides for temporary visits of Australian personnel in joint military training, exercise, humanitarian or other activities as may be approved by both parties. Neither does it authorize either country to deploy troops or conduct operations in the other's territory. However, it establishes the status of such forces when the parties arrange to send and/or receive forces as part of the countries' defense cooperation activities.

A total of 28 articles consist the agreement, which regulate the circumstances and conditions under which the Australian Visiting Force and its Civilian Component may be present in the Philippines. Under the agreement, the Visiting Force and the Civilian Component shall respect the law of the receiving State and shall be governed by the provisions on the responsibilities and procedures between the visiting forces and the host government. The agreement provides the basis for jurisdiction and custody in instances when visiting force personnel commit offenses while in the territory of the receiving State. The Service Authorities of Australia shall cooperate with the Philippine government to prevent any abuse or misuse of the privileges granted in favour of, and to ensure proper discharge of the obligations imposed on, members of the Visiting Force or its Civilian Component.

A joint committee is established to monitor the implementation of the agreement. The Philippine President ratified it on 23 December 2010. The Senate resolution sees that the agreement would contribute to the maintenance of regional and maritime security.

## SRI LANKA

### ECONOMIC RIGHTS OF AUTHOR'S WORK PROTECTED BY COPYRIGHT -BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS OF 1886 – COPYRIGHT,DESIGNS AND PATENTS ACT 1988 OF THE UNITED KINGDOM

***Associated Newspapers of Ceylon Ltd v. Pituwana Liyanage Shantha Chandraquptha Amarasinghe* [2012] S.C.CHC (App) No.30/2003 (Sri Lanka)**

This case is an appeal against a judgment from the Commercial High Court of Colombo, Sri Lanka on *inter alia* the question of economic rights of an author in a work protected by copyright, and the quantum of such damages.

Pituwana Liyanage Shantha Chandraquptha Amarasinghe (Respondent) alleged that his intellectual property rights had been violated by Associated Newspapers of Ceylon Ltd. (Appellant) publication of nine photographs taken by the Respondent, violating his economic rights and moral rights in such works. The pictures had been taken during the communal riots in July 1983, in an extremely volatile context and enduring great difficulty, including threats of harm and assault.

The Court refers to the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Convention), as amended, to which Sri Lanka is a signatory. According to the Convention, copyright for creative works does not have to be asserted or declared, as they are automatically in force at creation and are not subject to any formalities such as registration or application in countries adhering to the Convention. Further, all rights are protected until the author explicitly disclaims them or the copyright expires.

The Court also refers to section 171(3) of the Copyright, Designs and Patents Act 1988 of the United Kingdom in drawing guidance on the question of balancing the exercise of an author's copyright with the public interest.